(17,507.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 393.

HENRY BOLLN, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1899.

1 In the Supreme Court of the United States.

HENRY BOLLN, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error.

Comes now the plaintiff in error, and under rule 10 of this court makes a statement of the errors on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, to the end that the same, and no more, may be printed, as required by said rule—that is to say:

All of the first page of said record and that part of the 2nd page commencing at the top and ending with and including the word "to wit," in the 9th line thereof.

All of the 66th paragraph, found on page 10.
All of the 67th paragraph, found on page 10.
All of the 68th paragraph, found on page 10.
All of the 69th paragraph, found on page 10.
All of the 70th paragraph, found on page 10.
All of the 84th paragraph, found on page 11.
All of the 85 paragraph, found on page 12.
All of the 93rd paragraph, found on page 12.
All of the 94th paragraph, found on page 12.

That part of page 28 commencing with and including the words "the plaintiff in error," on the 4th line, down to and including the words "D. A. Campbell, clerk," on the 14th line, so that the part of the record hereinbefore indicated may read in words and figures following, to wit:

2 HENRY BOLLN
v.
STATE OF NEBRASKA. } No. 8508.

Pleas before the supreme court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 5th day of January, 1897.

Present: Hon. A. M. Post, chief justice; Hon. T. O. C. Harrison, Hon. T. L. Norval, judges.

Attest: D. A. CAMPBELL, *Clerk.*

Be it remembered that on the 21st day of May, 1896, there were filed in the office of the clerk of said court a certain petition and transcript in words and figures following, to wit:

In the Supreme Court of Nebraska.

HENRY BOLLN, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant. } Petition in Error.

The plaintiff complains of the defendant for that, on the 16th day of May, 1896, the defendant herein procured a judgment of

conviction against the plaintiff for embezzlement and procured a sentence to be imposed upon the plaintiff in the penitentiary in the district court of Douglas county in a criminal proceeding in said court, wherein the defendant herein was plaintiff and the plaintiff herein was defendant.

A transcript of the proceedings containing such final judgment is filed herewith

3 The plaintiff alleges that there is error in said proceedings, judgment, and sentence, in this, to wit:

66. The court erred in overruling defendant's motion to quash, filed April 4th, 1896.

67. The court erred in sustaining the demurrer of the State to the first paragraph of defendant's plea in abatement.

68. The court erred in sustaining the demurrer of the State to the second paragraph of defendant's plea in abatement.

69. The court erred in sustaining the demurrer of the State to the third paragraph of defendant's plea in abatement.

70. The court erred in sustaining the demurrer of the State to the fourth paragraph of the defendant's plea in abatement.

84. The court erred in overruling defendant's motion for a new trial.

85. The court erred in denying the demand of the defendant for a jury trial upon the issue of fact raised by the ninth paragraph of defendant's plea in abatement and the reply of the State thereto.

93. The court erred in overruling the defendant's specific demurrer, filed April 8th, 1896, to the information.

94. The court erred in overruling the defendant's general demurrer, filed April 8th, 1896, to the information.

The plaintiff in error therefore prays that said verdict herein be set aside and that said judgment and sentence be reversed and a new trial granted in said cause, and for such other relief as justice may require.

HENRY BOLLN,
Plaintiff in Error,
By JOEL W. WEST,
By JOHN M. MACFARLAND,
His Attorneys.

Endorsed: 8508. Bolln *v.* State. Petition in error. Supreme court of Nebraska. Filed May 21, 1896. D. A. Campbell, clerk.

4 Second.

Next print:

That further part of page 28 commencing with and including the words "Criminal App. Doc. No. 1, page 7," down to and including the words "Be it remembered that," in the second line from the bottom.

Then next, that part of page 43 commencing with and including the words "afterward, on the 2nd day of April," near the middle of the page, down to the bottom of said page; then from the top of page 44 down to but not including the words "count second."

Then next, that part of page 46 commencing with and including the words "count fourth" down to the bottom of said page; then from the top of page 47 down to but not including the words "count fifth."

Then next, that part of page 50 commencing with and including the words "count ninth" down to the bottom of said page 50; then next, from the top of page 51 down to but not including the words "count tenth."

Then next, that part of page 52 commencing with and including the words "count eleventh" down to the bottom of said page.

Then next, the first line of page 53.

Then next, that part of page 57 commencing with and including the word "contrary" to the end of the page.

Then next, that part of page 58 from the top down to and including the words "Filed April 2nd, 1896. Albyn L. Frank, clerk," so that the part of the record herein last above indicated shall read in words and figures, to wit:

5 Criminal App. Doc. No. 1, page 7.

Pleas before the Honorable Benjamin S. Baker, one of the judges and the presiding judge of the district court of the fourth judicial district of the State of Nebraska, at a term thereof within and for the county of Douglas, begun and held at the city of Omaha on the 4th day of May, A. D. 1896.

Be it remembered that afterward, on the 2nd day of April, 1896, an information was filed herein; which said information is in the words and figures following, to wit:

Information.

THE STATE OF NEBRASKA, } ss:
County of Douglas, }

Of the February term of the district court of the fourth judicial district of the State of Nebraska within and for the county of Douglas and State of Nebraska, in the year of our Lord one thousand eight hundred and ninety-six, I, Howard H. Baldridge, county attorney in and for the county of Douglas, in said State of Nebraska, who prosecutes for and on behalf of said State in the district court of said district, sitting in and for said county of Douglas, and duly empowered by law to inform of offenses committed in said county of Douglas, come now here in the name and by the authority of the State of Nebraska and give the court to understand and be informed that on the 28th day of July, in the year of our Lord one thousand eight hundred and ninety-three, Henry Bollu, late of the county of Douglas aforesaid, in the county of Douglas and State of Nebraska aforesaid then and there being and then and there being an officer, to wit, city treasurer, of the city of Omaha, in said county, and as such officer being charged with the collec-

tion, receipt, safe keeping, transfer, and disbursement of the public money and a certain part thereof belonging to the city of Omaha, an organized city in the county of Douglas State of Nebraska, then and there unlawfully and feloniously did fraudulently con-
6 vert to his own use and embezzle of said public money twenty-five hundred dollars in money of the value of twenty-five hundred dollars belonging to the said city of Omaha, an organized city in said county of Douglas, State of Nebraska, which said money had then and there come into the custody and possession of the said Henry Bolln by virtue of his said office as said city treasurer, and was then and there a portion of the public money received, controlled, and held by him for safe keeping, transfer, and disbursement as such city treasurer as aforesaid.

Count Fourth.

And the said Howard H. Baldrige, county attorney as aforesaid, upon his oath and by the authority aforesaid further gives the court to understand and be informed that the said Henry Bolln on the said 28th day of July, A. D. 1893, then and there being in said county of Douglas, in the State of Nebraska, and then and there being an officer, to wit, treasurer, of the board of education of the school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, and then and there, as such officer in his official capacity, being charged with the collection, receipt, safe keeping, transfer, and disbursement of a certain part of the public money, to wit, that part belonging to the school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, then and there unlawfully and feloniously did fraudulently convert to his own use and embezzle of said public money said twenty-five hundred dollars in money of the value of twenty-five hundred dollars belonging to said school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, which said money had then and there come into the custody and possession of the said Henry Bolln by virtue of his said office as said treasurer of the board of education of said school district and by virtue of his being an officer charged with the collection, receipt, safe keeping, transfer, and disbursement of the said public money as aforesaid, and which said money was then and there a portion of the public money received, controlled, and held by him as such officer for safe keeping, transfer, and disbursement as aforesaid; and the said county attorney further says that the offense charged in this count is and relates to the same offense and transaction set out in the first count of this information.

7 *Count Ninth.*

And the said Howard H. Baldrige, county attorney as aforesaid, upon his oath and by the authority aforesaid further gives the court to understand and be informed that the said Henry Bolln, on the said 23rd day of April, A. D. 1895, in the county of Douglas and State of Nebraska, then and there being in said county and

then and there being an officer, to wit, treasurer, of the board o education of the school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, and as such officer then and there being charged with the collection, receipt, safe keeping, transfer, and disbursement of the public money and a certain portion thereof belonging to the said school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, then and there unlawfully and feloniously did fraudulently convert to his own use and embezzle of said public money three thousand dollars in money of the value of three thousand dollars belonging to the said school district of the city of Omaha, in the county of Douglas, in the State of Nebraska, which said money had then and there come into the custody and possession of the said Henry Bolln by virtue of his said office as said treasurer of the board of education of said school district and by virtue of his being charged with the collection, receipt, safe keeping transfer, and disbursement of said public money as aforesaid, and which said money was then and there a portion of the public money received, controlled, and held by him for safe keeping, transfer, and disbursement as said officer as aforesaid; and the said county attorney further says that the offense charged in this count is and relates to the same offense and transaction set out in the sixth count of this information.

Count Eleventh.

And the said Howard H. Baldrige, county attorney as aforesaid, upon his oath and by the authority aforesaid further gives the court to understand and be informed that the said Henry Bolln on the 10th day of July, 1895, then and there being in said county of Douglas, in the State of Nebraska, and then and there being an officer, to wit, city treasurer, of the city of Omaha, in said county, and as such officer being charged with the collection,
8 receipt, safe keeping, transfer, and disbursement of the public money and a certain part thereof belong- to the said city of Omaha, an organized city in said county of Douglas, in the State of Nebraska, then and there unlawfully and feloniously did fraudulently convert to his own use and embezzle of said public money one hundred thousand dollars in money of the value of one hundred thousand dollars belonging to the said city of Omaha, an organized city in said county of Douglas, in the State of Nebraska, which said money had then and there come into the custody and possession of the said Henry Bolln by virtue of his said office as city treasurer, and was then and there a portion of the public money received, controlled, and held by him for safe keeping, transfer, and disbursement as such city treasurer as aforesaid, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of Nebraska.

HOWARD H. BALDRIGE,
County Attorney.

THE STATE OF NEBRASKA, } ss:
County of Douglas, }

I, Howard H. Baldrige, county attorney, being first duly sworn, on oath depose and say that I know the contents of the foregoing information; that I have read the same, and the facts set forth in said information are true to the best of my knowledge and belief.

HOWARD H. BALDRIGE.

Subscribed in my presence and sworn to before me this 2nd day of April, A. D. 1896.

EBEN K. LONG,
Justice of the Peace.

Endorsed: App. Doc. 1, No. 7. Charge, embezzlement and grand larceny. Douglas county district court. The State of Nebraska *vs.* Henry Bolln. Information. Filed April 2nd, 1896. Albyn L. Frank, clerk.

9 Third.

Next print all of page 61 and that part of page 62 from the top down to the end of the 4th paragraph, concluding with the words "due process of law," in the 5th line from the top.

Next, that part of page 63 commencing with and including the words "J. W. West," in the 6th line from the bottom, and concluding with the words "Attorneys for defendant," in the 4th line from the bottom; so that the part of the record indicated by this third paragraph of the instructions shall read in words and figures following, to wit:

10 Afterward, on the 4th day of April, 1896, motion to quash was filed herein; which said motion is in the words and figures following, to wit:

Motion to Quash.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff, }
vs. } Motion to Quash.
HENRY BOLLN, Defendant. }

Comes now the defendant, Henry Bolln, and moves the court to quash the 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 counts of the information filed herein and each of them upon the following grounds:

1. That there is no authority of law under and by which the county attorney is authorized to file an information charging this defendant with a felony.

2. Because the defendant under section 10 of article 1 of the constitution of the State of Nebraska has granted immunity from answering to a criminal charge except upon presentment or indict-

ment of a grand jury, and which immunity has not been by the legislature abrogated.

3. Because this prosecution is in contravention with section 3, article 1, of the constitution of the State of Nebraska, which guarantees that no person shall be deprived of life or liberty with- due process of law.

4. Because this prosecution is in contravention of section 1 of article 14 of the Constitution of the United States of America, by which the State of Nebraska has been forbidden to deprive this defendant of life or liberty without due process of law.

J. W. WEST,
JOHN M. MACFARLAND,
Attorneys for Defendant.

11 Fourth.

Next print that further part of page 63 commencing with the word "afterward," in the 3rd line from the bottom, to the end of the page, and then all of page 64, and then that part of page 66 commencing with the words "J. W. West" down to the bottom of the page; so that the part of the record indicated by this 4th paragraph of the instructions shall read in words and figures following, to wit:

12 Afterward, to wit, on the 4th day of April, 1896, plea in abatement was filed herein; which said plea in abatement is in the words and figures following, to wit:

Plea in Abatement.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
vs.
HENRY BOLLN, Defendant. } Plea in Abatement.

Comes now the defendant, Henry Bolln, in his own proper person and prays judgment that said information may be quashed for the following reasons:

1. That there is no authority of law under and by which the county attorney is authorized to file an information charging this defendant with a felony.

2. Because the defendant under section 10 of article 1 of the constitution of the State of Nebraska has granted immunity from answering to a criminal charge, except upon presentment or indictment of a grand jury, and which immunity has not been by the legislature abrogated.

3. Because this prosecution is in contravention with section 3, article 1, of the constitution of the State of Nebraska, which guarantees that no person shall be deprived of life or liberty without due process of law.

4. Because this prosecution is in contravention of section 1, article

14, of the Constitution of the United States of America, by which the State of Nebraska has been forbidden to deprive this defendant of life or liberty without due process of law.

J. W. WEST &
JOHN M. MACFARLAND, *Att'ys.*
HENRY BOLLN, *Defendant.*

STATE OF NEBRASKA, } ss:
Douglas County, }

Henry Bolln, being first duly sworn, depose- and says that the facts stated in the foregoing plea in abatement are true as he verily believes.

HENRY BOLLN.

Subscribed in my presence and sworn to before me this 4th day of April, 1896.

[SEAL.] ALBYN L. FRANK, *Clerk.*

13 Fifth.

Next print all of page 67 and that part of page 68 down to and including the words "H. H. Baldrige, county attorney," so that the part of the record indicated by this fifth paragraph of the instructions shall read in words and figures as follows, to wit:

14 Afterward, on the 4th day of April, 1896, demurrer to plea in abatement was filed herein; which said demurrer is in the words and figures following, to wit:

Demurrer to Plea in Abatement.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff, *vs.* HENRY BOLLN, Defendant. } Demurrer to Plea in Abatement.

Comes now the plaintiff, The State of Nebraska, and demurs separately to each and every one of the following paragraphs of the plea in abatement of the defendant filed herein, to wit, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, for the following reasons:

1st. Said paragraphs do not state facts sufficient to constitute a defense to this action.

2nd. That said paragraphs do not state facts sufficient to raise an issue upon the plea in abatement.

3rd. That the statement in said paragraph is not sufficient to constitute a plea in abatement.

4th. That the said paragraph does not allege any facts extrinsic to the record.

5th. That the said paragraph is not sufficient in substance to constitute a plea in abatement or a defense to this action.

6th. That said paragraph is insufficient in law to constitute a plea in abatement.

7th. That said paragraph is insufficient in law to constitute a defense to this action.

15 And further plaintiff demurs to the entire plea in abatement of the defendant filed herein, for the reason that said plea in abatement is insufficient in law to constitute a plea in abatement and does not state facts sufficient to raise an issue upon a plea of abatement and is insufficient in law to constitute a plea in abatement or a defense to this action.

H. H. BALDRIGE,
County Attorney.

16 Sixth.

Next print that further part of page 68 commencing with and including the words "afterward, at the February term of said court," down to and including the words "also coming," in the 5th line from the bottom.

Then that part of page 69 commencing with and including the word "whereupon," in the 2nd line from the top, down to and including the words "duly excepts," in the sixth line from the top.

Then that further part of page 69 commencing with and including the words "afterward, at the February term of said court," down to the bottom of the page.

Then all of page 70, so that the part of the record indicated by this sixth paragraph of the instructions shall read in words and figures as follows, to wit:

17 Afterward, at the February term of said court and on the 4th day of April, 1896, an order was entered herein as follows, to wit:

Order.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

Now, on this day, came the county attorney on behalf of the State of Nebraska, the defendant appearing in open court, his counsel also coming.

Whereupon this cause came on further to be heard upon the motion of the defendant filed herein for an order quashing the said information herein, and the court, on consideration, being fully advised in the premises, overrules said motion; to which ruling of the court the defendant duly excepts.

Afterward, at the February term of said court and on the 6th day of April, 1896, an order was entered herein as follows, to wit:

Order.

STATE OF NEBRASKA *vs.* HENRY BOLLN. } Information. Embezzlement and Larceny.

This day again came the county attorney on behalf of the State of Nebraska, the defendant appearing in open court, his counsel also coming, and this cause now coming on for hearing upon demurrer to the plea in abatement filed herein by defendant, and the said demurrer having been heretofore argued by counsel and submitted to and taken under advisement by this court, the court doth now, after due consideration and being fully advised in the premises, sustain the said demurrer as to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, and 18th reasons therein set forth; to which ruling of the court the defendant, by his counsel, duly excepts; and the court doth overrule the said demurrer as to the 9th reason therein set forth, with leave to
18 the State to reply instanter, the State duly excepting to the overruling of the 9th reason.

Afterward, on the 6th day of April, 1896, reply to the plea in abatement was filed herein; which said reply is in the words and figures following, to wit:

Reply to Plea in Abatement.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff, *vs.* HENRY BOLLN, Defendant. } Reply to Plea in Abatement.

Comes now the plaintiff, The State of Nebraska, and by leave of court first had and obtained, for reply to the ninth paragraph of the defendant's plea in abatement, heretofore filed herein, denies each and every allegation in said paragraph contained, except as herein expressly admitted.

Plaintiff admits that defendant has had no preliminary examination for said crime referred to in said 9th paragraph, but alleges that said defendant did waive said preliminary examination and his right thereto, as shown by the records of the court.

H. H. BALDRIGE,
County Attorney.

19 Seventh.

Next print the last three lines on page 73, commencing with and including the words "Afterward, on the 8th day," and then—

Next print all of page 74; then that part of page 75 from the top down to and including the words "The defendant duly excepts," in the 10th line from the top; then that further part of page 75 com-

mencing with and including the words "Whereupon, after the introduction," in the 9th line from the bottom, down to and including the words "duly excepts," in the 3rd line from the bottom.

Then that part of page 76 commencing with and including the words "And this cause now coming on," in the 4th line from the top, down to and including the words "entered a plea of not guilty for defendant," in the 16th line from the top, so that the part of the record indicated by this 7th paragraph of the instructions shall read in words and figures as follows, to wit:

20 Afterward, on the eighth day of April, 1896, demurrer was filed herein; which said demurrer is in the words and figures following, to wit:

Demurrer.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
vs.
HENRY BOLLN, Defendant. } Demurrer.

The said Henry Bolln, in his own proper person, comes into court here, and having been heretofore furnished with a copy of said information says that said information and facts therein contained and stated in manner and form as they are stated in said information are not sufficient in law, as they do not constitute an offense punishable by the law of this State, and that he, the said Henry Bolln, is not bound by the laws of the land to answer the same. Wherefore, for want of sufficient information in this behalf, the said Henry Bolln prays judgment and that by the court he may be dismissed and discharged from said premises in the information specified.

J. W. WEST,
JOHN M. MACFARLAND,
Attorneys for Defendant.

Afterward, at the February term of said court, and on the 8th day of April, 1896, an order was entered herein as follows, to wit:

Order.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

Now, on this day, came the county attorney on behalf of the State of Nebraska, the defendant appearing in open court, his counsel also coming, and both the defendant and the State announcing that they are now ready to proceed to trial upon the 9th paragraph of defendant's plea in abatement filed herein, thereupon defend-
21 ant demands a trial by jury, and the court, on consideration, overrules the said demand; to which ruling of the court the defendant duly excepts.

Whereupon, after the introduction of evidence both on the part of the State and of the defendant, and upon due consideration thereof, being fully advised in the premises, the court finds that the defendant waived a preliminary examination before the examining magistrate, and therefore finds against the defendant and overrules the said 9th paragraph of the said plea in abatement; to which ruling of the court the defendant duly excepts.

And this cause now coming on for further hearing upon the defendant's general demurrer filed herein to the information in this case, the court, on consideration, being fully advised in the premises, overrules the said demurrer; to which ruling of the court the defendant duly excepts.

Thereupon, the defendant now being duly arraigned for plea, the county attorney reads to the defendant each and every of the counts in the information herein, and the defendant to each and every of the said counts in the said information, as read to him by the county attorney, by his counsel refused to plead, and to each and every of the said counts in the said information, as read to him by the county attorney, the defendant stood mute; whereupon the court entered a plea of not guilty for defendant.

22 Eighth.

Next print that part of page 78 commencing with and including the words "Afterward, at the May term," near the middle of the page, down to and including the words "sworn according to law," in the bottom line.

Next print that part of page 127 commencing with the words "Afterward, at the May term," near the top of the page, down to the bottom.

Then all of page 128.

Then that part of page 129 from the top of the page down to and including the words "substantial rights," near the middle of the page.

Then that part of page 130 contained in the 8th assignment, being the 5th line from the top only.

Then that part of page 134, to wit, all of the 66th paragraph, all of the 67th paragraph, all of the 68th paragraph, all of the 69th paragraph, all of the 70th paragraph.

Then, on page 136, all of the 85th paragraph.

Then, on page 137, all of the 94th paragraph.

Then that part of page 151 from and including words "Joel W. West" to and including words "Henry Bolln;" also from and including the words "Afterward, at the May term," toward the top of said page, down to the bottom.

Then all of page 152.

Then all of page 153.

Then all of page 154, so that the part of the record indicated by this 8th paragraph of the instructions shall read in words and figures as follows, to wit:

23 Afterward, at the May term of said court and on the 4th day of May, 1896, a trial was had herein as follows, to wit:

Trial.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

This day came the county attorney, on behalf of the State of Nebraska, the defendant appearing in open court, his counsel also coming. Thereupon came the following-named persons as jurors, to wit:

Nels Anderson,	Jean Schons,	James Stribbling.
W. G. Anderson,	Gustave Hanson,	Jens Anderson,
Fred Schaf,	Henry Allen,	David L. Carpenter,
John Isberg,	John Blumberg,	Peter Svacina.

who were duly impanneled and sworn according to law.

Afterward, at the May term of said court and on the 9th day of May, 1896, said trial was continued and verdict rendered herein as follows, to wit:

Trial.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

This day came again the county attorney, on behalf of the State of Nebraska, the said defendant, Henry Bolln, appearing in open court, his counsel also coming; also came the jury heretofore impanneled and sworn, in charge of Bailiffs Norberg & Bone, and the trial proceeds.

Jury Retire.

And the said jury, now having heard the charge of the court, retire to their room, in charge of Bailiffs Norberg & Bone, for deliberation.

And afterward, to wit, on this same day, after due deliberation, the said jury returned into open court, in charge of said bailiffs, Norberg & Bone, with their verdict, in writing, signed by their foreman, and say:

Verdict.

In the District Court of Douglas County, Nebraska.

24 THE STATE OF NEBRASKA, Plaintiff,
vs.
HENRY BOLLN, Defendant. } Verdict.

We, the jury duly empaneled and sworn to well and truly try and true deliverance make between The State of Nebraska, plaintiff,

and Henry Bolln, defendant, do find the said defendant guilty of embezzlement in manner and form as charged in the fourth count of the information herein, and find the value of the money so embezzled to be $2,500.00.

We further find the defendant guilty of embezzlement in manner and form as charged in the ninth count of the information herein, and find the value of the money so embezzled to be $3,000.00.

We further find the defendant guilty of embezzlement in manner and form as charged in the eleventh count of the information herein and find the value of the money so embezzled to be $100,000.00.

We find the defendant not guilty upon the first, second, third, sixth, seventh, eighth, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth counts of said information.

JEAN SCHONS, *Foreman.*

Thereupon the said jury were discharged from further consideration of this cause and said defendant remanded to jail to wait sentence.

Afterward, on the 12th day of May, 1896, motion for new trial was filed herein: which said motion for new trial is in the words and figures following, to wit:

Motion for New Trial.

In the District Court of Douglas County, Nebraska.

STATE OF NEBRASKA, Plaintiff, *vs.* HENRY BOLLN, Defendant. } Motion for New Trial.

The defendant, Henry Bolln, moves the court for a new trial in this case for the following reasons affecting materially his substantial rights:

8. That the verdict is contrary to law.

66. The court erred in overruling the defendant's motion to quash, filed April 4th, 1896.

67. The court erred in sustaining the demurrer of the State to the first paragraph of the defendant's plea in abatement.

68. The court erred in sustaining the demurrer of the State to the second paragraph of the defendant's plea in abatement.

69. The court erred in sustaining the demurrer of the State to the third paragraph of the defendant's plea in abatement.

70. The court erred in sustaining the demurrer of the State to the fourth paragraph of the defendant's plea in abatement.

85. The court erred in denying the demand of the defendant for a jury trial upon the issue of fact raised by the ninth paragraph of the defendant's plea in abatement and the reply of the State thereto.

94. The court erred in overruling the defendant's general demurrer, filed April 8th, 1896, to the information.

JOEL W. WEST &
JOHN M. MACFARLAND,
Attorneys for Defendant, Henry Bolln.

Afterward, at the May term of said court and on the 15th day of May, 1896, said motion for new trial was overruled herein as follows, to wit:

Motion for New Trial Overruled.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

Now, on this day, came the county attorney, on behalf of the State of Nebraska, the defendant having been brought into court in the custody of the sheriff, his counsel also coming. Thereupon this cause came on for hearing upon the motion of the defendant, filed herein, to set aside the verdict of the jury heretofore rendered in this cause and for a new trial herein, and, after argument by counsel and due consideration, and being fully advised in the premises, it is adjudged by the court that the said motion for a new trial be, and the same hereby is, overruled; to which ruling of the court the defendant duly excepts and, on application, is hereby given forty (40) days from and after the rising of the court at its present term in which to prepare and serve a bill of exceptions herein;
26 and it is hereby further ordered that time for preparing and serving bill of exceptions in the plea in abatement be, and the same hereby is, extended to June 15th, 1896.

Afterward, at the May term of said court and on the 16th day of May, 1896, said defendant was sentenced herein as follows, to wit:

Sentence.

STATE OF NEBRASKA
vs.
HENRY BOLLN. } Information. Embezzlement and Larceny.

Now, on this day, came the county attorney on behalf of this State of Nebraska, the said defendant, Henry Bolln, having been brought into court in custody of the sheriff, his counsel also coming, and said defendant having heretofore been convicted of embezzlement of the sum of twenty-five hundred dollars ($2,500.00) of moneys belonging to the school district of the city of Omaha, Douglas county, Nebraska, as charged in the fourth (4th) count of the information in this case, was duly arraigned for sentence, and being informed by the court of the verdict of the jury as herein rendered against him, was thereupon inquired of if he had anything to say why the judgment and sentence of the court should not now be pronounced against him, and showing no good and sufficient reason to the contrary, it is therefore considered, ordered, and adjudged by the court that the said defendant, Henry Bolln, be taken hence to the jail of this said county of Douglas, and that thence within thirty (30) days, and as early as practicable, he be taken by the sheriff of this said county of Douglas to the penitentiary of this State and there be confined, at hard labor, for the

period of four (4) years from and after this sixteenth (16th) day of May, A. D. 1896, no part of which period of confinement is by virtue of this sentence to be spent in solitary confinement, and that the said defendant, Henry Bolln, pay a fine of five thousand dollars ($5,000.00) and pay the costs of this prosecution, taxed at — dollars ($—), for which execution is hereby awarded.

The said defendant, Henry Bolln, having been heretofore convicted of embezzlement of the sum of three thousand — ($3,000.00) of the moneys belonging to the school district of the city of
27 Omaha, Douglas county, Nebraska, as charged in the ninth (9th) count of the information in this case, being brought into court in custody of the sheriff, his counsel also coming, was thereupon duly arraigned for sentence and, being informed by the court of the verdict of the jury, as herein rendered against him, was inquired of if he had anything to say why the judgment of the court should not now be pronounced against him, and showing no good and sufficient reason to the contrary, it is therefore considered, ordered, and adjudged by the court that the said defendant, Henry Bolln, be taken hence to the jail of this said county of Douglas and that thence, within thirty (30) days and as early as practicable, he be taken by the sheriff of this said county of Douglas to the penitentiary of this State and there be confined at hard labor for the period of five (5) years, no part of which period of confinement is by virtue of this sentence to be spent in solitary confinement, such term of confinement to begin at the expiration of this sentence of four (4) years this day pronounced by this court against said defendant under fourth (4th) count of the information in this case, and that the said defendant, Henry Bolln, pay a fine of six thousand dollars ($6,000.00), for which execution is hereby awarded.

And the said defendant, Henry Bolln, having been heretofore convicted of embezzlement of the sum of one hundred thousand dollars ($100,000) of the moneys belonging to the city of Omaha, Douglas county, Nebraska, as charged in the eleventh (11th) count of the information in this case, being this day brought into court in the custody of the sheriff, his counsel also coming, was duly arraigned for sentence, and, being informed by the court of the verdict of the jury as herein rendered against him, was thereupon inquired of by the court if he had anything to say why the judgment and sentence of the court should not now be pronounced against him, and showing no good and sufficient reason to the contrary, it is therefore considered, ordered, and adjudged by the court that the said defendant, Henry Bolln, be taken hence to the jail of this said county of Douglas, and that thence, within thirty (30) days and as early as practicable, he be taken by the sheriff of this said county of Douglas to the penitentiary of this State and there be confined at hard labor for the period of ten (10) years, no
28 part of which period of confinement is by virtue of this sentence to be spent in solitary confinement, such term of confinement to begin at the expiration of the sentence of five (5) years this day pronounced by this court against said defendant on the ninth (9) count of the information in this case, and that the said

defendant, Henry Bolln, pay a fine of two hundred thousand dollars ($200,000), for which execution is hereby awarded; to all of which the defendant, by his counsel, duly excepts.

29 Ninth.

Next print all of page 189, all of page 190, all of page 191, all of page 192, all of page 193, all of page 194, all of page 195, all of page 196, all of page 197, all of page 198, all of page 199, all of page 200, all of page 201, all of page 202, all of page 203, all of page 204, all of page 205, all of page 206, all of page 207, all of page 208.

Then next print all of page 209, all of page 210, all of page 211, all of page 212.

Then next print all of page 215.

Then next print all of the petition for the allowance of a writ of error, so that the part of the record indicated by this 9th paragraph of the instructions shall read in words and figures as follows, to wit:

30 And afterward, to wit, on the 18th day of May, 1897, there was rendered by said court and entered of record a certain judgment in words and figures following, to wit:

HENRY BOLLN, Plaintiff in Error, *vs.* STATE OF NEBRASKA, Defendant in Error.	No. 8508.	Error from the District Court of Douglas County. Judgment of Affirmance.

This cause came on to be heard, was taken up and argued by counsel; on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that said judgment be, and the same hereby is, affirmed, and that the defendant in error recover of the plaintiff in error its costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, the 18th day of May, 1897, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

31 HENRY BOLLN *v.* STATE OF NEBRASKA. } No. 8508.

Opinion Filed May 18, 1897.

1. Chapter 54 of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county.

2. A denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error, since the record fails to disclose that the prisoner was in some manner prejudiced thereby.

3. It is not essential to the validity of an information that it should conclude "against the peace and dignity of the State."

4. An opinion formed by a juror does not affect his competency or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused of the offense charged. Basye *v.* State, 46 Neb., 261, followed.

5. An opinion based upon rumor and newspaper reports alone does not afford cause for challenge where it is shown that such opinion will not interfere with the juror's rendering a fair and impartial verdict upon the evidence under the instructions of the court.

6. Under section 124 of the Criminal Code the failure of any public officer to account to or make settlement of his official accounts with the proper legal authority within reasonable time after notice so to do, as well as the refusal of such officer to promptly pay over to his successor any public moneys or securities on the legal requirement of any authorized officer, is made *prima facie* evidence of embezzlement.

32 7. Held that the accused was not prejudiced upon the trial by the giving of the 15th and 16th paragraphs of the charge of the court.

8. Evidence examined and held sufficient to warrant a conviction for embezzlement of public moneys.

9. Under an information against a public officer charging embezzlement on a certain date evidence of a continuous series of conversions of money by the defendant at different times and in different amounts before that date will support a verdict finding the aggregate sum as the amount of a single embezzlement.

10. The disbursement of public funds by a city treasurer except upon a warrant drawn by the proper authority constitutes embezzlement.

11. A custom or usage repugnant to the commands of a statute will not prevail against such statute.

12. In a criminal prosecution the presence of the defendant at the trial being once shown by the record will be presumed to have continued to the end, where the contrary is not made to appear.

33 NORVAL, *J.*:

Henry Bolln was prosecuted in the district court of Douglas county upon an information filed by the county attorney charging him with the embezzlement of public moneys. The information was in sixteen counts, a part of which charging the defendant with embezzlement of certain moneys of the city of Omaha, and the remaining counts were for the embezzlement of certain moneys belonging to the school district of the city of Omaha. A motion to quash the information was made, which was overruled by the court. A plea in abatement was filed, to which the county attorney interposed a demurrer, which was overruled as to the ninth ground of the plea, and sustained as to the other seventeen grounds therein set forth. The State replied to the ninth paragraph of the plea in

abatement, and the accused demanded a jury trial upon said paragraph of his plea, which was denied, and upon a trial the court it overruled the plea in abatement. The defendant demurred to the several counts of the information, which the court promptly overruled, and the accused, when called upon to plead to the information, having stood mute, the court entered a plea of not guilty for him. The county attorney, by leave of court, entered a *nolle prosequi* as to the fifth and tenth counts of the information, and upon the trial the accused was found guilty as charged in the fourth, ninth, and eleventh counts, but was acquitted as to all the others upon which he was tried. From the denying of his motion for a new trial the defendant has brought this writ of error.

Whilst we are confronted with a record of over 1,000 pages, and a petition in error containing 279 assignments, the questions to be determined are not numerous, since most of the assignments are not discussed in the brief of defendant below. The familiar rule that assignments not relied on the briefs are deemed waived will be adhered to in this case.

34 The first contention of counsel for the accused, and which was raised by the motion to quash the information, plea in abatement, and by demurrer, is that there is no authority in this State for the prosecutions of crimes by information. The power of the legislature to provide by appropriate enactment for the trial of criminal cases in the district court upon informations filed by the public prosecutor or county attorney instead of indictments is not and doubtless could not be successfully questioned in view of section 10, article 1, of the State constitution, which declares, *inter alia*, "that the legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law abolish, limit, change, amend, or otherwise regulate the grand-jury system." Certainly the language quoted is broad enough to justify the law-making body to provide for prosecution of offenses by information alone. The argument of the prisoner's counsel is that the legislature of this State has not as yet so enacted, at least by express, plain, and unequivocal language. In 1885 a law was passed, which received executive approval, entitled "An act to provide for prosecuting offenses on information, and to dispense with the calling of grand juries except by order of the district judges." Criminal Code, chapter 54. If said act has not by plain and apt words made suitable provision for the prosecutions of offenses against the penal laws of the State by information, clearly it is not the fault of the title of the law to which reference has just been had. Language which would have more definitely or appropriately designated such a purpose could not easily have been chosen; but it is argued that there is nothing in the title to indicate that the law was intended to provide for the prosecution

35 of felonies by information. This position is not tenable. The title indicates a purpose to provide for the "prosecution of offenses on information," and the word offenses in the sense it is used embraces all infractions of the criminal code of the grade of felonies. In Miller *v.* State, 29 Neb., 437, it was held that a prosecution for

murder may be by information. The object indicated by the title to the act under consideration is clearly enough expressed in the body of the law, as an examination of its several provisions will disclose.

The first section (sec. 578 of said chap. 54) provides: "That the several courts of this State shall possess and may exercise the same power and jurisdiction to hear, try, and determine prosecutions upon information, for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of like prosecutions upon indictments."

By this the same jurisdiction was conferred upon the courts to hear, try, and determine prosecutions for crimes, misdemeanors, and offenses upon information as theretofore existed and had been exercised in like prosecutions upon indictments found by a grand jury. The subsequent sections of the act in connection with the one quoted above not only give authority for the prosecution by information, but point out the procedure as well. Section 2 requires all informations to be filed in term time in the court having jurisdiction of the particular offense by the prosecuting attorney of the proper county, provided that he shall subscribe his name thereto and indorse thereon the names of witnesses. The next section provides for the verifications of all informations and for joining of different offenses and different degrees of the same offense in
36 one information in like manner as could be joined in one indictment. The sixth section empowers the court to direct the prosecuting attorney to file the proper information in certain instances. We do not entertain the shadow of a doubt that the statute in question is ample to authorize a county attorney to file information for felonies in proper cases and to prosecute the accused thereunder. State *v.* Miller, 43 Neb., 860; Korth *v.* State, 46 Neb., 631. The trial of the accused upon the information of the county attorney did not contravene section 3, article 1, of the Constitution, which declares that "no person shall be deprived of life, liberty, or property without due process of law," since under and in pursuance of section 10 of the same article the legislature has authorized prosecution of offenses by information.

The ninth paragraph of the defendant's plea in abatement alleged that he had not had a preliminary examination touching the offenses charged in the information, and that he had not waived the same. To this averment the State replied, admitting that the defendant did not have a preliminary examination, denying each and every other allegation in said paragraph of the plea, and averring that the accused waived his right to a preliminary examination. The defendant demanded a trial by jury upon the issue tendered by the ninth paragraph of the plea in abatement, which was overruled, and the trial court found that the defendant had waived a preliminary examination before the examining magistrate, and accordingly overruled said paragraph of the plea in abatement. The denial of a trial by jury to determine whether the right to a preliminary examination had been waived by the prisoner is assigned for error. Conceding for the

purposes of this case that the accused was entitled to have this question passed upon by a jury, yet the refusal of his request did not work a reversal of the judgment of conviction.

37 Doubtless he could have waived the calling of a jury to pass upon that proposition had he so desired, since the statute does not specify how it shall be determined. It follows that the denial of a jury trial upon the issue in question was unimportant, as the defendant was in no manner prejudiced thereby. Suppose the uncontradicted testimony before the trial court had shown that a preliminary examination upon the crimes charged in the information has been waived by the defendant, he would not have been injuriously affected by the refusal of a jury to pass upon that portion of his plea, for had one been called the verdict must necessarily have been the same as the finding of the court. Error cannot be presumed, but must appear affirmatively to justify a reversal of a cause. The testimony adduced relating to the plea in abatement was not brought into the record by a bill of exceptions, nor is the transcript of the proceedings in the magistrate's court before us; therefore we are unable to determine whether the court below erred in denying the accused a trial of his plea in abatement by a jury. The issue of fact joined on this plea in abatement, involving as it did the question of a record in the case at bar, could be properly determined by the court without the intervention of a jury. This view is not in conflict with Arnold *v.* State, 38 Neb., 752, and Smith *v.* State, 42 Neb., 356, in which cases it was ruled that the trial of an issue of fact tendered by a plea in bar can only be tried by a jury. Those cases lack analogy. They were predicated upon section 449 of the Criminal Code relating to pleas in bar, which in express language requires the issues raised by such pleas to be determined by a jury. The provision of said section is mandatory, and the right thereby accorded the prisoner cannot be waived by him, while the statute and constitution alike are wholly silent as regards the trial of an issue of fact joined upon a plea in abatement.

38 Error is predicated upon the refusal of the trial court to sustain the defendant's motion to quash the several counts of the information. It is insisted that each count except the last one is bad because it did not conclude with the words "against the peace and dignity of the State of Nebraska." The rule sanctioned by long usage has been to conclude each count of an indictment or information with the words above quoted, but we have in this State no constitution or statute requiring it. In some of the States, under a constitutional provision defining what an indictment shall contain, indictments have been held defective which omitted the usual formal concluding words. In the language of Clark, J., in considering the same question in State *v.* Kirkman, 104 N. C., 911: "The conclusion 'against the peace and dignity of the King' was held in England to be necessary in all indictments. No reason was assigned for it except that it had been customary. It furnished no light to the defendant, and its employment was not required by any statute. As every criminal offense is, in its nature, 'against the peace,' its

use is tautology, and doubtless originated in the rhetorical flourish of some ancient and forgotten pleader." By section 412 of our Criminal Code it is provided that "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected; first, by the omission of the words, 'with force and arms,' or any words of similar import; or, second, by omitting to charge any offense to have been contrary to a statute or statutes; or, third, for the omission of the words, 'as appears by the record,' nor for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense; nor for stating the time imperfectly; nor for want of a statement of the value or price of any matter or thing, or the amount of damages or injury in any case where the value or price or the amount of damages or injury is not of the essence of the offense; nor for the want of an allegation of the time or place of any material fact when the time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; nor for an omission to allege that the grand jurors were impanneled, sworn, or charged; nor for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged; nor for want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

The object of the legislature in passing the foregoing was to prevent the obstruction of the administration of justice in criminal prosecutions being hampered or impeaded by useless technicalities or nice refinements. The statute has declared that no indictment shall be deemed invalid for any defect which does not tend to the prejudice of the substantial rights of the accused on the merits nor for the omission "to charge any offense to be contrary to a statute or statutes." It is obvious that the omission from the several counts of the information of the usual formal conclusions does not render them bad. Smith *v.* State, 4 Neb., 277; State *v.* Kirkman, 104 N. Car., 911; Peters *v.* State, 12 S. E. Rep. (N. Car.), 74; People *v.* Fowler, 25 Pac. Rep. (Tex.), 1110; Alexander *v.* State, 11 S. W. Rep. (Tex.), 628; Stebbins *v.* State, 20 S. W. Rep. (Tex.), 552.

It is argued that the court erred in not sustaining the defendant's challenge for cause to the juror Charles Bentley. The *voire dire* examination of Mr. Bentley is in the record before us, which discloses that he had an opinion as to the guilt or innocence of the defendant formed solely upon mere rumors and the reading of newspaper comments upon the crimes; that such opinion was not a settled or fixed one, but was conditional upon the truth of what he had heard and read; and, notwithstanding such opinion, he could render a fair and impartial verdict in the case based solely on the law and the evidence. No substantial cause for the challenge of Mr. Bentley existed, since the opinion he entertained was not unqualified as to the guilt or innocence of the accused. Basye *v.* State, 15 Neb., 261. We now reit-

erate what was said in passing upon a similar question in that case.

"If upon the whole examination of the juror it is manifest that the opinion formed by him from reading newspaper accounts of the alleged crime or upon rumor is merely hypothetical or conditional on the truth of the rumor or the newspaper reports read; that he has no settled opinion as to the guilt or innocence of the accused, and that he can render a fair and impartial verdict upon the evidence adduced on the trial under the instructions of the court, the juror is competent. * * * Under the statutes the mere fact that a juror has formed an opinion from what he has heard or read does not disqualify him from acting nor make him incompetent to serve as a juror. It is only when the veniremen has such a settled opinion or the examination shows such a state of mind as will preclude him from returning a true verdict upon the evidence submitted on the trial that he is disqualified. In other words, he is incompetent if he entertains an unqualified or unconditional opinion on the merits of the case, however formed, or an opinion of that fixed character which repels the presumption of innocence of the prisoner. The statute does not by express terms nor by fair implication disqualify one from serving as a juror who has read newspaper reports of the commission of the crime."

41 The errors assigned to the fifteenth and sixteenth instructions will be considered together, as they present the same questions. Instruction fifteen reads as follows: "You are instructed that if you find from the evidence, beyond a reasonable doubt, that the defendant was city treasurer of the city of Omaha, and if you further find, beyond a reasonable doubt, that the said city of Omaha, through its proper officer or through a person authorized so to do, made a demand upon the defendant to settle and account to the said city of Omaha for funds received by the defendant during his term of office as such city treasurer in the regular course of his business as such officer, and if you further find that the defendant neglected and refused to make settlement, and if you further find from the evidence, beyond a reasonable doubt, that there was any money received by the said Henry Bolln, defendant, as such city treasurer, such moneys being received in the regular course of business while the said Henry Bolln was treasurer of the said city of Omaha, and the said money being the property of the said city of Omaha, such demand for settlement and such refusal to turn over to the person authorized by the city of Omaha to receive such money, if you find that the said defendant did receive and hold any money, the property of the city of Omaha, is *prima facie* evidence that the defendant did embezzle such money, as you find, beyond a reasonable doubt, that the defendant did receive for safe keeping, transfer, and disbursement of the moneys of the said city of Omaha and which he refused and neglected to turn over and account for to the said city of Omaha."

The sixteenth instruction differs from the above in that the words "school district of the city of Omaha" are substituted for the words

"city of Omaha" in every place they are employed in said instruction fifteen.

42 The criticism offered upon said instructions is that, under section 124 of the Criminal Code, the presumption of embezzlement does not arise from the failure of a public officer to account to or make settlement for funds in his hands until the expiration of a reasonable time after notice so to do has been given him.

Said section 124 of the Criminal Code relating to the embezzlement of public moneys, *inter alia*, declares that "any failure or refusal to pay over the public money or any part thereof by any officer or other person, charged with the collection, receipt, transfer, disbursement, or safe keeping of the public money or any part thereof, whether belonging to the State, or to any county or precinct, or school district, or organized city *of* incorporated village in this State, or any other public money whatever; or any failure to account to, or to make settlement within a reasonable time after notice so to do, with any proper and legal authority of the official accounts of such officer or person, shall be held and taken as *prima facie* evidence of such embezzlement. And the refusal of any such officer or person, whether in or out of office, to pay any draft, order, or warrant which may be drawn upon him, by the proper officer, for any public money in his hands, no matter in what capacity the same may have been received or may be held by him, or any refusal, by any person or public officer named in this act, to pay over to his successor any public moneys, or securities promptly, on the legal requirement of any authorized officer of the State or county, shall be taken on the trial of any indictment against such officer or person for embezzlement, as *prima facie* evidence of such embezzlement."

By the foregoing the legislature has made either the failure of any public officer to account to or make settlement with the proper legal authority of his official accounts within a reasonable

43 time after notice so to do or any refusal of a public officer to promptly pay over to his successor any public moneys or securities on the legal requirement of any authorized officer *prima facie* evidence of embezzlement. Both of the instructions under consideration omitted to state that a reasonable time must elapse after notice for settlement and accounting has been received by an officer before the law will raise therefrom any presumption of embezzlement. For this omission a reversal is asked. In the light of the facts before us, we think it should be denied. The record discloses that the defendant was the treasurer of the city of Omaha and *ex officio* treasurer of the school district of said city for two terms. Early in July, 1895, he resigned his office and J. H. Dumont was appointed to fill the remainder of the official term, which expired in January following. A. G. Edwards was the duly elected and qualified successor of the latter. The defendant on July 11, 1895, accounted to and paid over to Dumont, his successor, for $221,705.69, which was only a portion of the funds in his hands belonging to the city of Omaha and the school district of said city,

and he had not at the time of the trial in the court below, on May 9, 1896, accounted for or paid over to the proper officer the residue of the public moneys received by him. On the 30th day of January, 1896, A. G. Edwards, the then treasurer of the city of Omaha and *ex officio* treasurer of said school district for and on behalf of said city, as well as said school district, and in pursuance of instructions from proper officers, made a written demand upon the defendant that he pay to said Edwards all moneys received by the defendant by virtue of his office from whatever source belonging to the city of Omaha and said school district, respectively. To this request and demand the defendant did not comply, but replied, "I cannot pay you, Mr. Edwards."

44 No request for further time in which to account and make payment was ever suggested by the accused; but his refusal to make settlement and payment was unequivocal. The information under which the trial was had was not filed until April 2, 1896. In view of the facts detailed, and the further fact that the defendant had deposited moneys of the city and school district respectively in certain banking institutions and had paid out several thousand dollars of the public funds without warrants or vouchers therefor, the defendant was not prejudiced by the giving of the instructions assailed. More than a *prima facie* case of embezzlement was made out by the uncontradicted evidence adduced on the trial. The statute requires a public officer to pay over to his successor all public funds unaccounted for to his successor promptly upon legal demand being made upon him therefor.

The next contention is that the verdict is not warranted by the evidence. The 4th and 9th counts of the information upon which the defendant was convicted charge the embezzlement of the sums of $2,500 and $3,000, respectively, belonging to the school district of the city of Omaha. It developed on the trial that the defendant had on deposit with the Omaha Loan & Trust Company savings bank about $10,000 of the funds belonging to the school district of Omaha, and of which amount he withdrew from said bank on July 28, 1893, the sum of $2,500. This he received in cash, and the evidence on behalf of the State tends to show that he never charged himself therewith nor accounted therefor or for any part thereof to the school district. The moneys came into his hands as their proper custodian, and he had wholly failed and refused to account for or pay the same over to his successor upon demand. To establish embezzlement it did not devolve upon the State to show how or where the moneys were converted by the defendant to his own use.

45 The proofs adduced by the State in support of the 9th count *is* fully as convincing, and *is* ample to sustain the averments of said count. The State, by uncontradicted testimony, traced the $3,000 of the school money therein mentioned into the hands of the defendant, and he failed and refused to account for the same in any manner whatever.

The other count upon which there was a conviction, the 11th, charges the defendant with the embezzlement of $100,000 of the

moneys of the city of Omaha. The shortage of the defendant for both terms of city treasurer was proven by the State to be $115,188.66. This is conceded in the brief filed by his counsel, although in argument at the bar it was insisted that the larger portion of this amount was made up by charging the defendant twice with the sum realized from one sale of city bonds. An analysis of the evidence fully refutes this contention and establishes that the defalcation of the defendant on account of city funds alone for both terms was over $100,000.

The point is made that a portion of the above shortage in the city funds occurred during the defendant's first term of office and more than three years prior to the filing of the information against him. This feature of the case was passed upon by the jury adversely to the defendant under instruction eleven, given by the court on its own motion, which in clear and explicit language submitted to them that question for consideration. The evidence shows that the embezzlement in the case at bar consisted of a continuous series of acts committed at different times, but with a common purpose, and hence constitute a single offense. State *v.* Reinhart, 38 Pac. Rep. (Ore.), 822; Brown *v.* State, 18 O. S., 496; Jackson *v.* State, 76 Ga., 551; Ker *v.* State, 110 Ill., 627; Gravatt *v.* State, 25
46 O. S., 162; Campbell *v.* State, 35 O. S., 70. Moreover, the evidence is ample to establish that over $100,000 of the funds of the city of Omaha were embezzled by the defendant within three years prior to the commencement of this prosecution.

There was no error in refusing to admit in evidence the communications of Theo. Olsen, comptroller, to the city council, since they did not tend to show that the defendant was not guilty of embezzlement.

When the defendant turned over his office to his successor, Mr. Dumont, there were in the cash drawer, carried as cash, slips and memorandum checks aggregating about $24,000, representing that amount of public funds which he had paid out to and which were carried as charges against various persons, mostly city employés and contractors with the city. The defendant offered to show that it had been the custom of the various city treasurers who had preceded the defendant in office to so pay out city funds. The offer was rejected, and such ruling is assigned as error. The fact, if it be a fact, that the money represented by said slips and checks in the cash drawer was paid out in pursuance of a custom with the knowledge of the city authorities did not make the transaction in question lawful. The disbursement of public funds in that manner was in violation of law, a practice in the highest degree reprehensible, and constituted embezzlement, notwithstanding the transaction was openly done with knowledge of the entire city government and might be sanctioned by a custom or usage as old as the Mosaic law.

Finally, it is argued that the defendant was not present in court when the jury returned their verdict. It is true the record does not affirmatively disclose that the prisoner was present at
47 the time the verdict was received, nor does it appear he was not so present. The journal entry, however, does recite that

Mr. Bolln was in court with his counsel when the jury were instructed, which was the same day the verdict was returned. His presence at the trial having been once shown by the record, the presumption will be indulged that it continued until the end, unless the contrary appears. Folden *v.* State, 13 Neb., 328; Dodge *v.* People, 4 Neb., 220.

We have with much care examined the voluminous record in this case, and have given every proposition argued in the brief for reversal careful consideration, and the conclusion is irresistable that the defendant has been accorded a fair and impartial trial, and, no error which could have prejudiced his substantial rights having been committed, a judgment of affirmance will be entered.

Affirmed.

48 And afterward, to wit, on the 20th day of September, 1897, there *was* filed in the office of the clerk of said court certain assignments of error in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

HENRY BOLLN, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error. } Assignments of Error.

Comes now Henry Bolln, plaintiff in error, and assigns the following errors in the record and proceedings in said cause, as follows:

1. The court erred in holding that "a denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error," for that section 11 of article 1 of the constitution of the State of Nebraska guarantees that in all criminal prosecutions the accused shall have the right to a speedy public trial by jury, the adoption of which provision was but declaratory of the common law and was intended to make definite and certain what in this State should be in that respect "due process of law."

And with the same end in view, and to make yet more definite and certain the full scope and meaning of said provision and what should constitute "due process of law," and that there might be an unequivocal enunciation of what is "the law of the land" in that behalf in this State, the legislature of the State of Nebraska enacted section 279 of the Code of Civil Procedure, defining "a trial" as "a judicial examination of the issues, whether of law or of fact in an action," whereby plaintiff in error has been deprived of his liberty without due "process of law," contrary to section 1, article 14, of the amendments to the Constitution of the United States.

2. That the court erred in holding that "a denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error," for the further reason that plaintiff in error asserted and claimed under the Constitution of the United States, to wit, under article 6 of the amendments thereof, the right and privilege of a

trial by jury, which said provision of the Constitution was
49 required to be adopted and was adopted by the people of the State of Nebraska pursuant to section 4 of the act of Congress passed April 19th, 1864, through, by, and under which the State of Nebraska was enabled to adopt a constitution and become one of the States of the Union, by reason of which premises said provision of the Constitution of the United States constitutes in the State of Nebraska that which is "due process of law" and "the law of the land," the decision of the said supreme court of Nebraska being against the right and privilege so asserted and claimed.

3. The court erred in holding that "a denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error," for that such decision and holding contravenes section 1, article 14, of the amendment of the Constitution of the United States, for that thereby plaintiff in error was deprived of his liberty without "due process of law."

4. The court erred in holding "that chapter 54 of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that such holding is contrary to section 10, article 1, of the constitution of the State of Nebraska, which secures to all persons accused of crime punishable by imprisonment in the penitentiary immunity from answering except upon presentment or indictment of a grand jury, and which immunity has not been taken away, abrogated, or in any manner abridged by the legislature of the State of Nebraska, and more particularly has it not been so taken away, abrogated, or abridged by said chapter 54 of the Criminal Code.

5. The court erred in holding "that chapter 54 of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that said section 10 of article 1 of the constitution of the State of Nebraska was enacted for the purpose of fixing definitely and certainly in the fundamental law that which should constitute in this State "due process of law," and that which should be "the law of the land," and by such holding the plaintiff in error has been deprived of his liberty without "due process of law," contrary to section 1, article 14, of the amendments of the Constitution of the United States.

50 6. The court erred in holding "that chapter 54 of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that such holding contravenes article 5 of the amendments of the Constitution of the United States, which secures to all persons accused of infamous crimes immunity from answering unless on a presentment or indictment of a grand jury, and which said provision was required to be adopted and was adopted by the people comprised within the territory of the State of Nebraska pursuant to section 4 of the act of Congress passed April 19th, 1864, through and by which the people comprised within said territory were enabled to adopt a State constitution and become one of the States of the Union, by which premises the said article 5 of the amendments of the Constitution of the United States became, was, and is within the State of Nebraska

"due process of law" and "the law of the land," and by reason of which holding plaintiff in error has been deprived of liberty "without due process of law," contrary to section 1, article 14, of the amendments of the Constitution of the United States.

7. The court erred in affirming the decision of the district court of Douglas county, wherein and whereby the plaintiff in error was convicted of a high crime and sentenced to the penitentiary of the State of Nebraska for three several terms aggregating nineteen years, whereby plaintiff in error has been deprived of his liberty without due process of law, contrary to section 1, article 14, of the amendments of the Constitution of the United States, for that said supreme court of the State of Nebraska is the highest court in said State in which said cause can be heard and determined.

HENRY BOLLN,
By J. W. WEST,
His Attorney.

51 Be it remembered that heretofore, to wit, on the 30th day of March, A. D. 1896, Howard H. Baldridge, county attorney, filed in the office of the clerk of the district court in and for Douglas county, State of Nebraska, an information for embezzlement and grand larceny in the case of the State of Nebraska against Henry Bolln; and afterward, at the May term of said court, and on the 16th day of May, A. D. 1896, said defendant, Henry Bolln, was sentenced to the penitentiary of said State, and afterward, on the 26th day of May, 1897, warden's receipt for said Henry Bolln was filed herein, which said warden's receipt reads and is in the words and figures following, to wit:

NEBRASKA STATE PENITENTIARY,
LANCASTER, NEB., *May 25th*, 1897.

To the clerk of court:

This doth certify that J. W. McDonald, sheriff of Douglas county, Nebraska, did, on the day of the date hereof, deliver to me at the penitentiary, at Lancaster, the body of Henry Bolln (4 years, 5 years, & 10 years), who was tried, convicted and sentenced at the May term, 1896, of the district court of said county, held at Omaha, Nebraska, May 16, 1897.

GEO. W. LEIDIGH,
Warden of the Penitentiary,
By THOS. WELSH, *Dep.*

Sentence affirmed by supreme court May 18, '97.

52 In the Supreme Court of the United States of America.

HENRY BOLLN, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error.
} Petition for the Allowance of a Writ of Error.

To the Supreme Court of the United States or the honorable judges thereof:

Comes now the plaintiff in error, Henry Bolln, and shows to the court that heretofore, to wit, on or about the 1st day of June, 1897, by the decision and judgment of the supreme court of the State of Nebraska, being the highest court in said State in which a decision can be had, the judgment and sentence of the district court in and for Douglas county, Nebraska, was affirmed, by and through which the plaintiff in error was sentenced to the penitentiary of the State of Nebraska for a period of nineteen years and to pay a fine of more than two hundred thousand dollars, under which judgment and sentence the plaintiff in error has ever since been and now is deprived of his liberty by being confined in the penitentiary of the State of Nebraska, and while thus immured by, through, and under the said judgment and sentence he has been unable to come sooner, but comes now and humbly petitions this court for a writ of error from this court to the supreme court of the State of Nebraska upon the ground and for the reason that a Federal question is involved herein, namely:

1. Whether or not the plaintiff in error is not thus deprived of his liberty without due process of law, in violation of and contrary to the provisions of section 1, article 14, of the amendments to the Constitution of the United States, in this: That the plaintiff in error was tried, convicted, and sentenced for a felony made specially infamous as a high crime by the laws of Nebraska by the district court of Douglas county, Nebraska, without being first
53 indicted or informed against by a grand jury, but solely and alone upon the information of a public prosecutor, notwithstanding the fact that the constitution of the State of Nebraska provides immunity from such prosecution except upon an indictment or presentment by a grand jury, and which immunity it is claimed has not been abrogated or taken away in any manner whatsoever, and notwithstanding the Constitution of the United States likewise secures immunity from such prosecution except upon presentment or indictment of a grand jury, and which provision of the Constitution of the United States it is claimed by the plaintiff in error operates as a prohibition upon the State of Nebraska, because by section 4 of the act of Congress passed April 19th, 1864, being the enabling act through, by, and under which the people of the State of Nebraska adopted a constitution and frame of government and were admitted into the Union, the people of the State of Nebraska were required to adopt and did adopt as their fundamental law the Constitution of the United States, and particularly that part thereof which secures all persons immunity from prosecu-

tions for infamous offenses otherwise than upon presentment or indictment of a grand jury.

2. Because the constitution and the statutes of the State of Nebraska have, with great particularity, defined those processes by and through which persons may be convicted and sentenced for infamous crimes, in this, to wit, section XI, article I, of the constitution provides that "in all criminal prosecutions the accused shall have the right * * * to a * * * trial by an impartial jury." * * *

By legislative enactment, section 279 of the Code, the trial is defined thus:

"A trial is the judicial examination of the issues, whether of law or of fact in an action," and therefore, whether or not the supreme court of the State of Nebraska, in denying the plaintiff in error the right to a jury trial upon an issue of fact tendered by a special plea that plaintiff in error had had no preliminary examination, nor had he waived the same, violated the provisions of section 1, article 14, of the amendment of the Constitution of the United States, and whether or not thereby plaintiff in error has been deprived of his liberty without due process of law, all of which is made to more particularly appear by the assignment of error filed herein and the record in the case.

54 Wherefore plaintiff in error prays that the said errors herein complained of may be corrected and that he have full and speedy justice done him in the premises, and to that end that a writ of error issue to the supreme court of the State of Nebraska.

HENRY BOLLN,
Plaintiff in Error,
By JOEL W. WEST,
His Attorney.

Finis.

And nothing further.

JOHN C. COWIN AND
J. W. WEST,
Attorneys for Pl'ff in Error.

I hereby acknowledge service of the foregoing this 18th day of Sept., 1899.

C. J. SMYTH, *Att'y Gen.*

55 In the Supreme Court of the United States.

HENRY BOLLN, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error. } Stipulation.

It is hereby stipulated by and between the parties to the above-entitled case that the certificate of the chief justice of the supreme court of Nebraska, setting forth the parts of the briefs filed in the supreme court of Nebraska by plaintiff in error, which contain the only reference made in said briefs by the plaintiff in error to the

Federal questions relied on in this court, and which certificate is now on file in the office of the clerk of this court, may be treated as a part of the record in said cause and printed as such in this court.

JOHN C. COWIN,
J. W. WEST,
Att'y- for Pl'ff in Error.
THE STATE OF NEBRASKA,
By C. J. SMYTH, *Attorney General.*

56 [Endorsed:] In the Supreme Court of the United States. Henry Bolln, plaintiff in error, *v.* The State of Nebraska, defendant in error. Stipulation. J. W. West, att'y for pl'ff in error. The State of Nebraska, by C. J. Smyth, att'y gen.

57 In the Supreme Court of the State of Nebraska.

HENRY BOLLN, Plaintiff in Error,
v.
THE STATE OF NEBRASKA, Defendant in Error. } Certificate of Chief Justice.

THE STATE OF NEBRASKA, *ss:*

I, T. O. C. Harrison, chief justice of the supreme court of the State of Nebraska, do hereby certify that the only reference made by counsel for plaintiff in error in written argument in this court in the above-entitled case to the Constitution of the United States or any part thereof or to any Federal law or to any part thereof is set forth in the following language, quoted from their brief in this case:

Sec. 10 of article I, of the Constitution, provides that "No person shall be held to answer for a criminal offense, * * * unless on a presentment or indictment of the grand jury: Provided, that the legislature may, by law, provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may, by law, abolish, limit, change, amend, or otherwise regulate the grand-jury system."

A criminal prosecution is not essentially different from an ordinary civil action at law; that is to say, before there is anything to try, there must be an issue of fact made by the pleadings. It is not necessary to go into the history of events that led up to the constitutional provision above set out which is practically the same as contained in our Federal Constitution, and I believe in the constitution of every State of the Republic.

It is sufficient to call to the minds of the court, that the abuses which followed from compelling the subject to answer to the accusation of a public prosecutor in the early times, became so
58 intolerable that it was thought to be of the first importance that immunity should be secured to the accused from making an issue of fact until the accusation should regularly come from the action of a grand jury. A whole community and even the King himself, might accuse, but the accusation challenged no answer

until it came from a grand jury. It would seem then that nothing short of a legislative enactment in the plainest and most unequivocal language, would be sufficient to take away so valued an immunity, and no legislative enactment should be permitted by mere implication to do so.

In this case, it will be observed that the defendant, at every stage of the proceeding, challenged the authority of the court to compel him to make an issue by plea to the information of the county attorney; and when called upon to plead, stood mute—not obstinately nor contumaciously—while the court entered a plea of not guilty for him.

The sole authority for the prosecution of offenses by information is found in chapter 54 of the Code.

The first section of the act confers jurisdiction upon the courts to try upon information, because without such a provision there would be no jurisdiction.

The second and third provisions relate to the form of the information.

The fourth section undertakes to make certain other provisions of law applicable to trials upon information, and the fifth provision relates to imprisonment and recognizances.

Nowhere in the act is there any express language that an accused shall be held to answer to the information of a public prosecutor as the language of the constitution gave authority to the legis-
59 lature to provide by appropriate legislation. In the whole act, there is nothing more than a bare implication that an accused should be required to enter a plea.

Upon this ground, the defendant claims that his trial upon the information of the county attorney was not only in contravention of the article of the constitution referred to, but was also in contravention of section 3, of article I, of our constitution, and also of section 1, of article XIV, of the Constitution of the United States, both of which provisions guarantee that no person shall be deprived of life or liberty without due process of law, and we now claim for our client the protection of those constitutional provisions.

Again, the provisions of the chapter referred to, are vastly wider in their scope than the title of the act would indicate. Nor is there anything in the title, "Prosecution of offenses by information" that would challenge the attention of the legislator that the bill was intended to be so far reaching as to provide for the prosecution of offenses of the gravity of felonies—that is where the punishment was by imprisonment in the penitentiary—by information of a public prosecutor and thereby supply such legislative authority as might be permissible under section 10, article I, of the constitution.

If the provisions of this law are in fact unconstitutional, every consideration of the public weal ought to prompt this court to so declare; for the time will certainly come when it will be discovered that the travail with which freedom was born and the bill of rights secured is a more certain proof of its excellence than the mere item of expense or cumbersomeness is a reason for its abolition.

Let us analyze: The constitutional immunity is from prosecu-

tions for offenses which are punishable as felonies and has
60 nothing to do with that class of offenses which are punishable by fine and imprisonment otherwise than in the penitentiary, and many of which were indictable. And the constitutional permission is for the legislature to enact by appropriate legislation for the prosecution of felonys by information.

Now chapter 54 has for its title, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges."

Surely there is nothing in the title that would lead one to suppose that the act following was to deal with the right of a public prosecutor to hold a person to answer for a felony. Again, when you come to analyze the act, there is absolutely nothing in it from beginning to end that authorizes the county attorney to file informations charging a person with a felony.

Sections 2 and 3 of the act are as follows:

SEC. 2. "All informations shall be filed during term, in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him."

SEC. 3. "All informations shall be verified by the oath of the prosecuting attorney, complainant, or some other person, and the offenses charged therein shall be stated with the same fullness and precision in matters of substance, as is required in indictments in like cases. Different offenses and different degrees of the same offense may be joined in one information, in all cases where
61 the same might, by different counts in one indictment; and in all cases a defendant or defendants shall have the same right, as to proceedings therein, as he or they would have if prosecuted for the same offense upon indictment."

These proceedings merely point out a procedure and give no authority for the procedure itself. The first section, as was said above, merely confers jurisdiction upon the courts—a jurisdiction which could not be exercised at common law though express authority were given to the county attorney to file informations and compel the accused to plead thereto. A court well might have conferred upon it, such jurisdiction, and yet there would be no implication that because it had such jurisdiction, that therefore, there must be some one with authority to file informations.

Section 7 of the same act provides: "Grand juries shall not hereafter be drawn, summoned, or required to attend at the sitting of any court within this State, as provided by law, unless the judge thereof shall so direct by writing, under his hand, and file with the clerk of said court." This provision is in direct contradiction of chapter 39, title "Grand jury," and could have no force unless it had been enacted as an amendment to that chapter. It can claim no such validity, and is therefore absolutely void. It would seem

therefore to follow, that a grand jury should have been summoned for the February term of the district court of Douglas county, and the defendant had the right to have the accusation against him investigated by such grand jury.

We do not question the authority of the legislature to provide by suitable enactments for the trial of persons upon information for felonies and what has been above said in argument, has been so said with special reference to the case of Miller *vs.* The State,
62 45 Northwestern, 451, and we respectfully submit that none of the questions above discussed, seem to have entered into a consideration of that case.

The same question it will be observed, was raised by the defendant's plea in abatement which was disposed of by the court sustaining the demurrer of the State thereto as to all except the 9th paragraph which charged that the defendant had had no preliminary examination touching the crime charged in the information, nor had he waived the same. To this allegation in the plea in abatement, the State replied by denying each and every allegation contained in the said 9th paragraph of defendant's plea in abatement.

See page 27 of the record.

A trial was had upon that issue of fact in which the defendant demanded a jury, which demand was overruled and a trial was had to the court. Testimony of witnesses was taken on the part of the State and of the defendant.

See page 30 of the record.

The denial of the right of the trial by jury upon this issue of fact is assigned as error in the 85th paragraph of the petition in error.

The constitutional provision is, "The right of trial by jury shall remain inviolated * * *." That is, in every case where such a right was accorded prior to the adoption of our Constitution it remains now. Authorities upon this subject as applicable to the point in question appear to be meager.

We have the authority of this court for the proposition that the determination of such an issue as presented by the said 9th paragraph, must be raised by plea in abatement and a reply
63 thereto. A determination of that issue in favor of the defendant would just as effectually end the case as would a verdict in favor of the defendant upon the plea of former conviction or acquittal. The analogy would seem to require that the right of a jury trial in the one case would be just as essential as in the other. In all our research touching this question, we do not find that the right of a jury trial upon a question of fact has ever been denied in a law action, except perhaps in some cases of mutual account between the parties where it was well-nigh impossible for a jury to successfully unravel them.

Section 11 of the bill of rights, however, goes farther: "In all criminal prosecutions, the accused shall have the right to * * * a speedy public trial by an impartial jury."

Bouviere has adopted the following as his definition of a trial:

"The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue." This definition is generally accepted by text writers and courts as being complete in itself.

The determination of the issue presented by this plea in abatement falls fairly within the definition.

In Bohanan *vs.* The State, 15 Neb., 209, this court denominated such a determination a trial and reversed the judgment of conviction because a trial had been refused. In this case, while a trial was not refused, a trial by jury was refused, and can hardly be less then reversable error.

The several counts of the information were separately attacked by motion to quash.

See pages 21 and 22 of the record.

And this motion ought to have been sustained as to all of the counts and to the whole information on the grounds stated above.

64 Dated November 10th, 1899.

[Ten cent U. S. internal-revenue stamp, canceled Nov. 10, '99. T. O. C. H.]

T. O. C. HARRISON,
Chief Justice.

STATE OF NEBRASKA, *ss:*

I, D. A. Campbell, clerk of the supreme court of said State of Nebraska, do hereby certify that Hon. T. O. C. Harrison, by whom the foregoing certificate was made and given and in his own proper handwriting has hereunto subscribed his name, was at the time of his so doing and now is chief justice of said supreme court, duly commissioned and sworn and acting.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 13th day of November, A. D. 1899.

[Ten-cent U. S. internal-revenue stamp, canceled 11, 13, '99. D. A. C.]

D. A. CAMPBELL, *Clerk.*

65 [Endorsed:] File No., 17,507. Supreme Court U. S., October term, 1899. Term No., 393. Henry Bolln, pl'ff in error, *vs.* The State of Nebraska. Stipulation and addition to record. Filed Nov. 27, 1899.

Endorsed on cover: File No., 17,507. Supreme Court U. S., October term, 1899. Term No., 393. Henry Bolln, plaintiff in error, *vs.* The State of Nebraska. Statement of errors and designation by plaintiff in error of parts of record necessary to be printed. Filed September 22, 1899.

No. 393.

Office Supreme Court U. S.
FILED
OCT 16 1899
JAMES H. McKENNEY,
Clerk.

Motion to advance.

In the Supreme Court of the United States.

393

Filed Oct. 16, 1899.

HENRY BOLLN,
Plaintiff in Error,

vs

THE STATE OF NEBRASKA,
Defendant in Error.

Motion to Advance.

ERROR TO THE SUPREME COURT OF NEBRASKA.

JOEL W. WEST,
for Plaintiff in Error,

C. J. SMYTH,
ATTORNEY GENERAL OF THE STATE OF NEBRASKA,
for Defendant in Error.

The Daily Record Print, Omaha

In the Supreme Court of the United States.

HENRY BOLLN,
Plaintiff in Error,

vs

Motion to Advance.

THE STATE OF NEBRASKA,
Defendant in Error.

Comes now the plaintiff in error and moves the court to advance this cause to an early hearing under the third sub-division of Rule 26. In that behalf, the court is informed that this cause involves the liberty of the plaintiff in error who was convicted of an infamous offense by the District Court of Douglas County, Nebraska, and sentenced to the penitentiary of the State of Nebraska for a period of nineteen years and which judgment and sentence of the said District Court was afterwards affirmed by the Supreme Court of the State of Nebraska and it is believed, and claimed, that all of such proceedings so had and done, were under such forms as that the plaintiff in error has been deprived of his liberty without due process of law, contrary to the 14th amendment of the Federal Constitution and likewise contrary to the

5th amendment of the Federal Constitution, which 5th amendment, it is claimed. is a limitation upon state power within the State of Nebraska by virtue of Section 4 of the Act of Congress, passed April 19th, 1864, being the enabling Act under which the people of the territory of Nebraska were enabled to form a constitution and state government. This motion is based upon the ground that it is a criminal cause, and that the plaintiff in error has for a long time and is now, confined in the penitentiary of the State of Nebraska, under and by virtue of the judgment and sentence which are sought by these proceedings to reverse.

HENRY BOLLN,

BY John W. Norton

His Attorney.

HENRY [illegible],
Plaintiff in Error,

vs.

THE STATE OF NEBRASKA,
Defendant in Error.

ERROR TO THE SUPREME COURT OF NEBRASKA.

[illegible] W. Wray,
for Plaintiff in Error.

ATTORNEY GENERAL OF THE STATE OF NEBRASKA,
for Defendant in Error.

IN THE SUPREME COURT

...OF THE...

UNITED STATES.

HENRY BOLLN,
Plaintiff in Error,

vs.

THE STATE OF NEBRASKA,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

ERROR TO THE SUPREME COURT OF NEBRASKA.

JOEL W. WEST,
for Plaintiff in Error.

ATTORNEY GENERAL OF THE STATE OF NEBRASKA,
for Defendant in Error.

The Act of Congress of April 19th, 1864, [Thirteenth United States Statutes at Large, page 47,] was passed for the purpose of enabling the people of Nebraska to form a constitution and state government, and for the admission of such state into the Union.

After making provisions for the boundaries of the proposed state, and for a constitutional convention, the Act, by Section 4 thereof, provided:

"That members of the convention thus elected shall meet at the capital of said territory on the first Monday in July, next, and after organization, *shall declare on behalf of the people of said territory that they adopt the Constitution of the United States*, whereupon the said convention shall be, and it is hereby authorized to form a constitution and state government; provided, that the constitution, when formed, shall be republican and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence; * * *."

Pursuant to that Act, the convention adopted a state constitution, of which Section 6, of Article XI, provides:

"This constitution is formed, and the State of Nebraska asks to be admitted into the Union on an equal footing with the original states on the condition and faith of the terms of the proposition stated and specified in an Act of Congress, approved April nineteenth, 1864, authorizing the people of the territory to form a constitution and state government; the people of the State of Nebraska hereby accepting the conditions in said Act specified."

Section 8, Article I, of said State Constitution, (being the declaration of rights) provided that,

"No person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or in the navy, or the militia when in actual service in time of war or public danger; and no person for the same offense shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require."

Upon the adoption of said constitution by the vote of the people, the fact of its adoption, with a copy of the said constitution, was duly certified to the president under the provisions of the Act, and thereupon, by a proclamation of the president, Andrew Johnson, of date March 1st, 1867, it was formally

proclaimed and declared that the fundamental conditions imposed by Congress on the State of Nebraska, to entitle that state to admission to the Union, had been ratified and accepted and fully complied with, and that the admission of said state into the Union was on that date complete.

Afterwards, in 1875, the people of the State of Nebraska adopted for themselves a new constitution, of which Section 10, of Article I, (being of the bill of rights) provided that:

"No person shall be held to answer for a criminal offense, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in case of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; provided, *that the legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law abolish, limit, change, amend, or otherwise regulate the grand jury system.*"

Afterwards, in 1885, the legislature passed Chapter LIV of the Criminal Procedure, for the purpose, as it is contended by the state, to enable prosecutions of criminal offenses of the grade of felonies on information of a public prosecutor, under the permission granted by the proviso in Section 10 above quoted. The chapter is as follows:

"Chapter LIV.—Prosecution of offenses by information. An Act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges.

Be it enacted by the Legislature of the State of Nebraska:

"Section I. (JURISDICTION.)—That the several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of the like prosecutions upon indictments.

"Section II. (INFORMATION.)—All informations shall be filed during term in the court having jurisdiction of the offense specified

therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him.

"Section III. (SAME—VERIFICATION—STATEMENT OF OFFENSE.)—All information shall be verified by the oath of the prosecuting attorney, complainant, or some other person, and the offense charged therein shall be stated with the same fullness and precision in matters of substance as is required in indictments in like cases. Different offenses and different degrees of the same offense may be joined in one information, in all cases where the same might, by different counts in one indictment; and in all cases a defendant or defendants shall have the same right, as to proceedings therein, as he or they would have if prosecuted for the same offense upon indictment.

"Section IV. (ACTS APPLICABLE.)—That the provisions of Chapters XL, XLI, XLII, XLIII, XLIV, XLV, of the Criminal Code in relation to indictments, and all other provisions of law applying to prosecutions upon indictments to writs, and process therein, and the issuing and service thereof, to motions, pleadings, trials, and punishments, or the execution of any sentence and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to informations, and all prosecutions and proceedings therein.

"Section V. (IMPRISONMENT—RECOGNIZANCE.)—Any person who may, according to law, be committed to jail, or become recognized or held to bail with sureties for his appearance in court to answer to any indictment, may in like manner so be committed to jail or become recognized and held to bail for his appearance, to answer to any information or indictment, as the case may be.

"Section VI. (DUTY OF PROSECUTOR.)—It shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense wherein the offender shall be committed to jail, or become recognized or held to bail, and if the prosecuting attorney shall determine in any such case that an information ought not to be filed, he shall make, subscribe, and file with the clerk of the court, a statement in writing containing his reasons, in fact and in law, for not filing an information in such case, and that such statement shall be filed at

and during the term of court at which the offender shall be held for his appearance; provided, that in such case such court may examine said statement, together with the evidence filed in the case, and if, upon such examination, the court shall not be satisfied with said statement, the prosecuting attorney shall be directed by the court to file the proper information, and bring the case to trial.

"Section VII. (GRAND JURIES.)—Grand juries shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within this state, as provided by law, unless the judge thereof shall so direct by writing, under his hand, and filed with the clerk of said court.

"Section VIII. (PRELIMINARY EXAMINATION.)—No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination; provided, however, that information may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed may be demanded by the governor of said state of the executive authority of any other state or territory, or of any foreign government, in the same manner, and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment filed.

"Approved March 9th, A. D. 1885."

No other authority of any kind has ever been given by the legislature for prosecuting offenses upon the information of a public prosecutor.

Section XI, Article I, of the Constitution of Nebraska, provides:

"In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, *and a speedy public trial by an impartial jury* of the county or district in which the offense is alleged to have been committed."

By legislative enactment, Section 270 of the Code, a trial

is defined thus:

"A trial is the judicial examination of the issues, whether of law or of fact, in an action."

Section 124, of the Criminal Code, defines the crime of embezzlement of public money by an officer or other person charged with the collection, receipt, safe keeping, transfer or disbursement of the public money or any part thereof. And, among other things, provides that such a crime

"* * * * * * is hereby declared to be a *high crime* and such officer or person shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled * * * * * * * *."

By Section 247, of the Criminal Code, "*felony*" is defined thus:

"The term "felony" signifies such an offense as may be punished with death or imprisonment in the penitentiary." * * *

By Section 2, Article 7, of the Constitution of the State of Nebraska, persons convicted of felony are disfranchised, which provision is in the following terms:

"No person shall be qualified to vote who is *non compos mentis* or who has been convicted of treason or felony under the law of the state or of the United States. * * * *."

The constitutional and statutory provisions above quoted are all that are necessary for a discussion of the Federal questions, which, it is claimed by plaintiff in error, are presented by the record.

Under the provisions of the Criminal Code above quoted, and upon no other authority whatsoever, the County Attorney of Douglas County, Nebraska, on the 2nd day of April, 1896,

made and filed an information against the plaintiff in error, which, by numerous counts, charged the plaintiff in error with the embezzlement of public moneys, as city treasurer of the City of Omaha and *ex-officio* treasurer of the school district of Omaha.

To this information the plaintiff in error, on the 4th day of April, 1896, filed a plea in the nature of a plea in abatement, which prayed judgment that said information might be quashed for many reasons; the ninth ground being:

"Because the defendant has had no preliminary examination touching the crime charged in this information, nor did he waive the same."

Upon this allegation the State made an issue by filing on the 6th day of April, 1896, an answer as follows:

"Plaintiff admits that defendant has had no preliminary examination for said crime, referred to in said ninth paragraph, but alleges that said defendant did waive said preliminary examination and his right thereto."

On the 8th day of April, 1896, the cause came on for trial on the issue so made, whereupon the plaintiff in error demanded a trial of said issue by a jury, which demand was refused by the court and over the objection of the plaintiff in error, a trial was thereupon had to the court *without a jury*, resulting in a finding and judgment against said plaintiff in error upon said plea.

Prior to this trial, and on the 4th day of April, the sufficiency of the information and the right to file the same was challenged by the plaintiff in error in a motion to quash, by a demurrer, and as well by the plea in abatement, in the following language, identical in each case: Because,

"1. That there is no authority in law under and by which the County Attorney is authorized to file an information charging this defendant with a felony.

"2. Because the defendant, under Section 10, of Article I, of the Constitution of the State of Nebraska, has been granted immunity from answering to a criminal charge, except on presentment or indictment of a grand jury, and which immunity has not been by the legislature abrogated.

"3. Because this prosecution is in contravention of Section 3, Article I, of the Constitution of the State of Nebraska, which guarantees that no person shall be deprived of life or liberty without due process of law.

"4. Because this prosecution is in contravention of Section 1, of Article XIV, of the Constitution of the United States of America, by which the State of Nebraska has been forbidden to deprive this defendant of life or liberty without due process of law."

These grounds were held by the court to be insufficient, and the decision of said court was against the right, privilege and immunity so specially set up and claimed.

Afterward, on April 8th, 1896, the plaintiff in error was arraigned, whereupon, as a challenge to the jurisdiction of the court over his person, and not contumaciously, *he refused to plead, but stood mute.* The court then entered a plea of not guilty for and on behalf of the defendant.

A trial of the issues was thereupon had, and on the 9th day of May, 1896, the jury returned a verdict finding the plaintiff in error guilty upon three several counts as charged in the information.

On the 16th day of May, 1896, the District Court of Douglas County, in which the plaintiff had been tried, rendered its judgment upon said verdict, that the said Henry Bolln, plaintiff in error, be punished by imprisonment in the penitentiary for three several, cumulative terms, aggregating nineteen

years, and pay a fine of more than two hundred thousand dollars.

Proceedings in error were thereupon prosecuted in the Supreme Court of the State of Nebraska, being the court of last resort, for the purpose of reviewing and reversing said sentence and judgment.

In these proceedings, among the numerous assignments of error, it was alleged that the proceedings upon the trial were erroneous.

Because there was no authority of law under and by which the County Attorney was authorized to file an information charging the defendant with a felony.

Because the defendant, under Section 10, of Article I, of the Constitution of the State of Nebraska, has been granted immunity from answering to a criminal charge, except upon presentment or indictment of a grand jury, and which immunity had not been by the legislature abrogated.

Because the prosecution was in contravention of Section 3, Article I, of the Constitution of the State of Nebraska, which guarantees that no person shall be deprived of life or liberty without due process of law.

Because the prosecution was in contravention of Section 1, of Article XIV, of the Constitution of the United States of America, by which the State of Nebraska had been forbidden to deprive the defendant of life or liberty without due process of law.

The cause being submitted to the said Supreme Court upon the petition in error and the record, the decision again was against the right, privilege and immunity so specially set up and claimed, and the judgment and sentence of the trial court was affirmed.

Bolln vs. The State, 51 Neb., 581.

Pursuant to said judgment and sentence the plaintiff in error was thereupon incarcerated in the penitentiary of the state, where he ever since has been and now is.

The following assignment of errors are relied upon for a reversal of this cause:

1. The court erred in holding that "A denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error," for that Section 11, of Article I, of the Constitution of the State of Nebraska, guarantees that in all criminal prosecutions the accused shall have the right to a speedy public *trial by jury*, the adoption of which provision was but declaratory of the Common Law, and was intended to make definite and certain what in this state should be in that respect, "due process of law."

And with the same end in view, and to make yet more definite and certain the full scope and meaning of said provision, and what should constitute "due process of law," and that there might by an unequivocal enunciation of what is "the law of the land" in that behalf in this state, the legislature of the State of Nebraska enacted Section 279, of the Code of Civil Procedure, defining "A Trial" as "a judicial examination of the issues, whether of law or of fact, in an action," whereby plaintiff in error has been deprived of his liberty without due "process of law," contrary to Section 1, Article XIV, of the Amendments to the Constitution of the United States.

2. That the court erred in holding that "A denial of a

jury trial upon an issue of fact tendered by a plea in abatement is not reversible error," for the further reason that plaintiff in error asserted and claimed under the Constitution of the United States, to-wit, under Article VI of the amendments thereof, the right and privilege of a trial by jury, which said provision of the constitution was required to be adopted and was adopted by the people of the State of Nebraska, pursuant to Section 4 of the act of Congress passed April 19th, 1864, through, by and under which the State of Nebraska was enabled to adopt a constitution and become one of the states of the Union, by reason of which premises said provisions of the Constitution of the United States constitutes in the State of Nebraska that which is "due process of law," and "the law of the land," the decision of the said Supreme Court of Nebraska being against the right and privilege so asserted and claimed.

3. The court erred in holding that "A denial of a jury trial upon an issue of fact, tendered by a plea in abatement, is not reversible error," for that such decision and holding contravenes Section 1, Article XIV, of the amendment of the Constitution of the United States, for that thereby plaintiff in error was deprived of his liberty without "due process of law."

4. The court erred in holding "that Chapter 54, of the Criminal Code, authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that such holding is contrary to Section 10, Article I, of the Constitution of the State of Nebraska, which secures to all persons accused of crime punishable by imprisonment in the penitentiary immunity from answering, except upon present-

ment or indictment of a grand jury, and which immunity has not been taken away, abrogated or in any manner abridged by the legislature of the State of Nebraska, and more particularly has it not been so taken away, abrogated or abridged by said Chapter 54, of the Criminal Code.

5. The court erred in holding "that Chapter 54, of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that said Section 10, of Article I, of the Constitution of the State of Nebraska, was enacted for the purpose of fixing definitely and certainly in the fundamental law that which should constitute in this state "due process of law," and that which should be "the law of the land," and by such holding the plaintiff in error has been deprived of his liberty without "due process of law," contrary to Section 1, Article XIV, of the Amendments of the Constitution of the United States.

6. The court erred in holding "that Chapter 54, of the Criminal Code, authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county," for that such holding contravenes Article 5, of the amendments of the Constitution of the United States, which secures to all persons accused of infamous crimes immunity from answering unless on a presentment or indictment of a grand jury, and which said provision was required to be adopted, and was adopted, by the people comprised within the territory of the State of Nebraska, pursuant to Section 4, of the Act of Congress passed April 19th, 1864, through and by which the people comprised within said territory were enabled to adopt a

state constitution and become one of the States of the Union, by which premises the said Article V, of the Amendments of the Constitution of the United States, became, was and is, within the State of Nebraska, "due process of law" and "the law of the land," and by reason of which holding plaintiff in error has been deprived of liberty without "due process of law," contrary to Section 1, Article XIV, of the Amendments of the Constitution of the United States.

7. The court erred in affirming the decision of the District Court of Douglas County, wherein and whereby the plaintiff in error was convicted of an infamous crime and sentenced to the penitentiary of the State of Nebraska for three several terms, aggregating nineteen years. Whereby, plaintiff in error has been depriveed of his liberty without due process of law, contrary to Section 1, Article XIV, of the Amendments of the Constitution of the United States, for that said Supreme Court of the State of Nebraska is the highest court in said state in which said cause can be heard and determined.

ARGUMENT.

On behalf of the plaintiff in error it is claimed:

1. That due process of law as to *federal jurisdiction* comprehends immunity from being compelled to answer to a capital or otherwise infamous offense, except upon the presentment or indictment of a grand jury.

Hurtado vs. California, 110 U. S., 535.

In the District of Columbia, nor in any of the territories, nor in any Federal Court, could a prosecution of a felony made, specially infamous as a "*high crime*," be legally carried on in any other way.

2. It was the intent and purpose of Section 4, of the Act of Congress of April 19th, 1864, which authorized the people of Nebraska to form a constitution and state government to perpetuate within the geographical limits which was to comprise the State of Nebraska all of those broad and general maxims and safe-guards of liberty which were secured by our federal constitution in the Bill of Rights.

As no one could be prosecuted in a Federal Court or in any federal territory contrary to the provisions of the Fifth Amendment, so it was intended by the Act of Congress above referred to, that no one should ever, within the State of Nebraska, after its admission into the Union, be prosecuted in any State court, contrary to the provisions of the said amendment.

As compliance with all the provisions of the Federal Bill of Rights at the very least constituted due process of law in the

federal jurisdiction, so it was intended by the Act of Congress above referred to, that within the State of Nebraska, after its admission into the Union, nothing short of compliance with those provisions would or could constitute due process of law.

3. The people of the State of Nebraska have no power to adopt any constitutional provision that will in any manner take away or abridge any right, privilege or immunity that the people had secured to them by the Federal Constitution, while under the territorial government, and it is therefore claimed that that part of Section 10, of Article I, of the Constitution of the State of Nebraska of 1875, which undertook to give the legislature authority to provide by law for holding persons to answer for criminal offenses on information of a public prosecutor, is void and of no effect.

For the purpose of the discussion, we adopt, as a definition of "due process of law," as used in the Fourteenth Amendment, the enunciations by this court in numerous cases.

> "It (due process of law,) refers to *that law of the land in each state* which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."
>
> *Hurtado vs. California*, supra (page 535).

"The law of the land necessarily means the law of the state where the offense is committed and where the trial takes place."

Hurtado vs. California, supra.

Garnett vs Jennings (Ky.), 44 S. W., 382.

"The XIV amendment was not designed to confine the states to particular modes or procedure in judicial proceedings. It does not mean, nor has it the effect, to limit the power of state governments in the prosecution of criminals to any particular mode of procedure in the selection of its jurors, or manner of conducting its trials, *but require that such trials shall be conducted in the due course of the administration of justice according to the prescribed forms and judicial procedure of the state for the protection of the individual rights and liberties of its citizens.*"

Hurtado vs. California, supra (p. 533).
Walker vs. Savinet, 92 U. S., 90.
Davidson vs. New Orleans, 96 U. S., 97.

"Due process of law is process due according to the law of the land. *This process in the states is regulated by the law of the state.*"

2 Hare Const. Law, pp. 751-752.

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that if the Supreme Court of a state had acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process.

Missouri vs. Lewis, 101 U. S., 22.

These quotations furnish the text of the argument that follows.

It is claimed that Nebraska came into the Union under the Act of Congress referred to, with the right of her people

"to make their own laws and alter them at pleasure"

limited by all the provisions of the federal constitution, which, in their nature, were enunciations of those rights, privileges, immunities and safe-guards secured by Magna Charta and our Bill of Rights, as contained in the Federal Constitution.

In Cooley's Constitutional Limitations, 4th edition, page 38, it is said:

"In regard to the formation and amendment of state constitutions, the following appear to be settled principles of American Constitutional law:

"I. The people of the several territories may form for themselves state constitutions whenever enabling acts for that purpose are passed by Congress, *but only in the manner allowed by such enabling acts.* * * * * *

"II. * * * * *

"III. * * * * *

"IV. * * * * *

"V. The power of the people to amend or revise their constitution is limited by the Constitution of the United States in the following particulars:

"(1.) It must not abolish the republican form of government, since such Act would be revolutionary in its character, and would call for and demand direct intervention on the part of the government of the United States.

"(2.) It must not provide for titles of nobility, or assume to violate the obligation of any contract, or attaint any persons of crime, or provide *ex post facto* for the punishment of acts by the courts which were innocent when committed, or contain any other provision which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the states by the Constitution of the Union. For while such provisions would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both state and national, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people in their primary capacity as makers of the fundamental law, as when enacted in the form of statutes through the delegated power of their legislatures."

The court is bound to give to Section 4, of the Enabling

Act above quoted, such an interpretation as will give it some force and effect as distinguished from a mere meaningless provision.

It needed no specific act on the part of the people within the proposed State of Nebraska to make the Federal Constitution operative and effective to the same degree and extent that it was effective and operative in every other state. In that respect they could neither add to nor detract from its operative force by any act of their own. So that to give Section 4, of the Enabling Act above quoted, a legitimate meaning, it must be understood that by the words "shall declare on behalf of the people of said territory that they adopt the Constitution of the United States," it was the intention of Congress that the Constitution of the United States within the State of Nebraska should have a peculiar and local binding force and effect, not common to the other states.

The country had just emerged from a civil war, brought about in no small degree by the doctrine of State Rights, promulgated and adhered to by a large number of the states. In view of the history of the times it can hardly be doubted that Congress intended by the words used in the Enabling Act above quoted, that the same limitations upon federal power provided by the first ten amendments should also be limitations upon the state power within the State of Nebraska.

It may be put down as nothing short of an absolute certainty, that at that time Congress would not have tacitly or by implication assented to the doctrine that the Consitution of the

Unied States was not paramount and supreme in every foot of federal territory.

To suppose that the provision of the Enabling Act quoted was placed there for the purpose of making the Constitution of the United States binding and effective within the proposed State of Nebraska in the same sense that it was binding upon the other states, would have amounted to such an admission.

It cannot be supposed that that provision was put into the Enabling Act as a mere excess of prudence. The war had already been fought and won, and every question involved in the waging of it had been forever settled. These considerations support our contention by *a proof reductio ad absurdum.*

Prior to the admission of Nebraska into the Union no such requirement had ever been exacted from any other state seeking admission.

The people of the territory of Nebraska were not then, nor never had been, in a state of rebellion against the general government. The federal authority within that territory had always been loyally recognized. The United States courts sitting in and for that district were then, and always had been, exercising their jurisdiction freely and without question. The United States marshals were then, and always had been, executing the federal writs and processes without let or hindrance, so that we are led irresistibly to the conclusion that the people of the State of Nebraska were required to adopt the Constitution of the United States, to the end and purpose that all of its broad and fitting provisions should become a part of the organic law of the new state, more fundamental and immutable

than any constitution or law that the state itself might adopt, and not as an overt and conspicuous act of allegiance.

Carrying out the principles embodied in the quotation above made, from Cooley's Constitutional Limitations, and applying them to the power of the people of Nebraska, to amend or revise their constitution, in view of the construction which we place upon Section 4, of the Enabling Act, then to the powers which he enumerates as prohibited to the states by the Constitution of the Union, there would, with respect to Nebraska, be added other prohibitions; that is to say, the State of Nebraska can neither by constitutional nor statutory provision establish any religion nor prohibit the free exercise thereof; nor abridge the freedom of speech or of the press; nor the right of the people peaceably to assembly and petition the government for a redress of grievances. Nor can it infringe upon the right of the people to keep and bear arms. Nor can it, in time of peace, quarter any soldier in any house without the consent of the owner. Nor can it interfere with the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. *Nor can it provide for holding any person to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury*, except within the proviso of the Federal Constitution. Nor in *any* criminal prosecution can it deprive the accused of his right to a speedy public *trial by an impartial jury*.

To attempt to do any of these things, contrary to the provisions of the Federal Constitution within the State of Nebraska, is to proceed without due process of law.

To use the language of Judge Cooley, while the enactment of constitutional provisions which might attempt to do any of those things within the State of Nebraska, "*would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both state and national, to refuse to enforce them, and to declare them altogether void, as much when enacted in their primary capacity as makers of the fundamental law as when enacted in the form of statutes through the delegated power of their legislatures.*"

4. It is claimed by the plaintiff in error that within the State of Nebraska, or within any other state, for that matter, no process of law is "*due process of law*" that proceeds contrary to valid provisions of the State Constitution.

"*The law of the land necessarily means the law of the state where the offense is committed and where the trial takes place.*"

Garnett vs Jennings, supra.

And here, assuming for the purposes of the argument only, that the people of the State of Nebraska did have authority to adopt Section 10, of Article I, of the Constitution of 1875, as it stands with the proviso touching prosecutions upon information of a public prosecutor, and supposing that the legislature had never provided by law for holding persons to answer for criminal offenses on information of such public prosecutor, then, as we interpret *Hurtado vs California, supra*, a prosecution for a capital or otherwise infamous crime by information of a public prosecutor would not be *due process of law*. In other words, in those states where there is a valid

constitutional provision governing such prosecutions, those provisions constitute in that regard *due process of law,* and the XIV Amendment is a prohibition upon those states from conducting such prosecutions in any other way less favorable to the accused.

5. It is claimed by plaintiff in error that the legislature of the State of Nebraska has never provided by law for holding persons to answer for felonies upon the information of a public prosecutor within the *proviso* of Section 10, Article I, of the Constitution of 1875, nor in no way whatsoever has that immunity ever been taken away from persons within the State of Nebraska.

It is claimed that Chapter LIV, of the Penal Code of the State of Nebraska, under which the state in this case claimed the right to prosecute plaintiff in error upon information, does not directly or indirectly, by implication or construction, give such authority.

The language of the act is perfectly plain and free from the least ambiguity. Every provision of it can be given full effect without granting the claims of the state made here.

In the consideration of this case it is confidently believed that every case has been examined in which the Supreme Court of the United States has had under consideration the binding force and effect of the construction given by a state court to the laws and constitution of that state, and this case is now discussed in the light of those decisions.

Let us assume, therefore, that it is the settled rule of this court to treat the *construction* which a state court has put upon

its statutes as being as much a part of the law of that state as the statutes themselves.

But this court has never assented to the doctrine that state courts may exercise legislative functions under the guise and cloak of statutory interpretation or construction, or that it will be bound by such acts of usurpation.

The federal guarantee to the people of the several states of a republican form of government, which comprehends the distribution of powers among three well recognized branches of the government, would preclude the possibility of such assent.

Let it be supposed that the plaintiff in error had been convicted and sentenced without having been indicted, or even informed against, by a public prosecutor, but solely and alone upon *an order to show cause* why he should not be sentenced to the penitentiary, and upon review in error proceedings the Supreme Court of Nebraska had declared that Chapter LIV, of the Penal Code, *supra*, gave authority for such proceedings, and that the judgment and sentence in the case were legal. Would this court permit itself to be bound by such pretended *construction* and *interpretation*, when brought here for review?

The supposed case is no stronger than the actual one before us.

The language of Section 10, Article I, of the Constitution of 1875, "No person shall be held to answer for a criminal offense," etc., follows the language of the Federal Constitution on the same subject, and the Federal Constitution, says Judge Taney, in the Dred-Scott decision, "Has always been remarkable for the facility of its arrangement of different subjects

and the perspicuity and appropriateness of the language it uses," yet some assistance may be obtained as to the true meaning of the constitutional provision under consideration by amplification of it.

It may be extended in various ways without in the least changing its meaning, and with no other effect than to cause such meaning to stand forth more conspicuously.

For instance, it might be extended thus:

"Though the several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information for crimes, misdemeanors and offenses, to issue writs and processes and do all other acts therein as they may possess and exercise in cases of like prosecution upon indictments, *yet* no person shall be held to answer for a criminal offense except in cases in which the punishment is by a fine or imprisonment otherwise than in the penitentiary, in case of impeachment and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; provided, that the legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor."

A more extended amplification would be:

"Notwithstanding all the provisions of Chapter LIV, of the Penal Code, *still*, no person shall be held to answer for a criminal offense, etc., * * * * * * unless on a presentment or indictment of a grand jury; provided, that the legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor."

The constitutional provision was intended to secure to the person immunity from a real and virile danger, and to stand as a fence about his person from accusations from every source, except when made by a grand jury.

It had in contemplation that the state might invest its courts with power and jurisdiction to hear, try and determine

prosecutions upon information, yet those courts should be powerless to compel the accused to make an issue until such time as the legislature should by law provide that the immunity should be taken away and the person held to answer.

It contemplated that though the state might invest its proper prosecuting officers with power and authority to file informations in cases of felony, yet no person should be required to plead to such information until the legislature had by law provided for *holding persons to answer* to the information of a public prosecutor.

It contemplated that though each and every one and all of the provisions of Chapter LIV, of the Penal Code, might be enacted by the legislature, and be the law of the state, yet, until the legislature had by law provided for holding persons to answer to the information of a public prosecutor, all the machinery of the state would be powerless to compel the accused to plead to such an information and make an issue to be submitted to a court and jury.

By what process of reasoning can it be held that the enactment of Section 1, of Chapter LIV, takes away the personal immunity of the individual?

At the risk of being wearisome, we venture to illustrate that the point may be made more clear, if possible, because it is the most vital one in the contention that we make.

Successful vaccination secures immunity from smallpox, but the immunity is purely personal to the subjeect. A visitation of the smallpox does not take away that immunity from the vaccinated individual. Both conditions are perfectly con-

sistent and both are correlated in the thought expressed in the word "immunity."

To those who faithfully keep all the commandments of Holy Writ it is promised in the XCI Psalm that such shall have immunity from the pestilence that walketh in the darkness and the destruction that wasteth at noonday and the plague, nor the terror by night, nor the arrow that flieth by day, shall have power to hurt them. But there is no intimation that when the pestilence and the plague was sent that they would *per se* be less virulent or less able to kill and destroy.

And who would venture the argument that because the same benevolent being who had given the immunity afterwards sent the pestilence and plague among men, that that of itself *ipso facto* worked a revocation of the immunity theretofore given.

Happily, Infinite Justice does not mock poor mortals thus, though Nebraska justice may.

The District Courts of Nebraska are under the constitution clothed with common law power, so that under the authority of *Hurtado vs California* they would have power to try felonies upon information of a public prosecutor without the aid of any legislative enactment; but whether they have such common law power, or whether they possess it solely and alone by virtue of Section 1, of Chapter LIV, can make no difference as far as the *immunity* of the individual is concerned, from liability to plead to the information of a public prosecutor.

It will be noted as another remarkable feature of the act that nowhere in it, from beginning to end, is there any author-

ity conferred upon the public prosecutor to file an information in a felony case. If such authority is conferred anywhere by the act, such authority must be found in Sections 2 and 3.

Section 2 says:

"All informations shall be filed during term in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him."

Section 3 provides:

"All information shall be verified by the oath of the prosecuting attorney, complainant, etc."

Now, in the State of Nebraska, and I presume in most other states, it has always been permissible and legal to prosecute for *misdemeanors* upon information, and, therefore, in giving a meaning to the words "all information," as used in Sections 2 and 3, by what possible rule of interpretation would any court be justified in construing or interpreting those sections as giving *authority* to a county attorney to file an information in a *felony case*, where at the very most the law only purports to give *directions* touching the filing of informations that are within the power of a County Attorney to file, and then by what other rule of interpretation or construction could the meaning of those sections, or of the preceding one, be stretched to a meaning that one so informed against should be required and held to plead to such information in face of the constitutional provision that he should not be held to so anwser until the legislature had by law provided that he must?

In this connection let us instance in what manner the law has spoken in a few of the many cases.

"Every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation."

Chicago, etc., R. R. Co. vs. People, 67 Ill., 11.

"And this consideration presses with increasing weight according to the severity of the penalty."

United States vs. Moulton, 5 Mason, 537.

"Every provision intended for the benefit of the accused receives the most favorable construction."

United States vs. Ragsdale, Hempst. 497.

"The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment."

American Fur Co. vs. United States, 2 Pet., 367.

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a very strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."

United States vs. Wiltberger, 5 Wheat., p. 76-95.

But these quotations are unnecessary to elucidate principles that are elementary.

Here we are dealing with a right and immunity which has, among all English speaking peoples for five hundred years, been deemed so sacred and necessary to conserve liberty and freedom that it has been carefully preserved in the fundamental

law of every state, so as to be secure and beyond the reach of the fluctuating caprices of erratic legislatures.

And now, granting that the State of Nebraska did have power to provide in its fundamental law that that sacred right and immunity might be taken away by legislative enactment, we are met with the monstrous doctrine, that because the legislature has by law provided that the several courts of the state may have jurisdiction over the subject matter of crimes when prosecuted upon information, that, therefore, they likewise have been invested with jurisdiction over the person, and may strip him of the constitutional immunity solely by virtue of their jurisdiction over the subject matter.

And, likewise, are we met with the no less monstrous doctrine that because the legislature has said "*All information* shall be filed during term time," etc., and "*All information* shall be verified by the prosecuting attorney," etc. That thereby authority is given to a public prosecutor to stand in the place and stead of the grand jury in making accusations in felony cases.

It cannot be supposed that the Supreme Court of Nebraska in its decision in this case had in mind that because the plaintiff in error had been stripped of his property by a fine of more than two hundred thousand dollars, and incarcerated in the penitentiary for a term of nineteen years, upon conviction of a felony made specially infamous as a "high crime," that therefore redress for him through another court, where abides the right of final review, was so remote as to be impossible; nor can it be supposed that the Supreme Court of Nebraska is unfamiliar with the simple and elementary principles of interpre-

tation and construction; nor is it to be supposed that that court would overleap the well defined boundaries of its own department and assume to legislate for the state.

Their decision in this case is, therefore, from a lawyer's standpoint, as unexplainable as the canals and dykes of Mars.

Chapter LIV, of the Criminal Code, herein above quoted, is practically a literal copy of the statutes of Michigan and Wisconsin on the same subject; and in both of those states prosecutions for felonies upon information filed by a public prosecutor have long been in vogue and sustained, from which it is likely to be suggested that the attack here made upon the Nebraska law must be futile. However, a comparison of the Constitutions of Michigan and Wisconsin with that of Nebraska leads to quite the contrary conclusion.

In Michigan there is no constitutional *immunity* from prosecution in any particular way, further than that:

"No person shall be deprived of life, liberty or property without due process of law."

While in Wisconsin the original constitutional provision with respect to prosecutions of offenses upon indictments was amended in 1870 so as to read:

"No person shall be held to answer for a criminal offense without due process of law * * * *."

So that in both of those states the only essential is that criminal prosecutions shall be carried on under such forms as amount to due process of law, and there is in neither of those states any *personal immunity* secured by the constitution which require to be abrogated and taken away before prosecutions

can be had upon informations. Under the holding in *Hurtado vs. California, supra,* requirements of due process of law are fully met by prosecutions upon information as provided for in both Wisconsin and Michigan.

6. Again, we assume that in all of those jurisdictions where the right of a trial by jury in a criminal case is secured by the constitution, that in those jurisdictions due process of law requires that convictions may be legally had in felony cases only at the hands of a jury.

And we assume further that it is within the power of every state, by legislative enactment, to define what shall constitute a trial, to the end and purpose that in those proceedings where parties are to be finally concluded, as to life or liberty, due process of law shall have an exact and certain meaning.

"Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state."

2 Hare Const. Law, 751.
Hurtado vs. California, supra.

The Constitution of the State of Nebraska guarantees to every person tried for a felony *a trial by jury.*

The legislature has enacted that "A *trial* is a judicial examination of the issues, whether of law or of fact, in an action."

Sec. 279 of the Code.

In the case at bar an issue of fact was joined between the parties as to whether or not the plaintiff in error had waived a preliminary examination. This issue involved an examination and determination of a fact just as essential to a legal convic-

tion under the laws of the State of Nebraska as would be proof of the *venue* or the *corpus delicti* itself.

Coffield vs. State, 44 Neb., 417.

The record shows that the plaintiff in error demanded his right in this behalf and was refused.

But let us quote directly from the opinion of the Supreme Court of Nebraska as to the proceedings before the trial court and in what manner the question involved is disposed of by the said Supreme Court. In that opinion the court says:

"The ninth paragraph of the defendant's plea in abatement alleged that he had not had a preliminary examination touching the offenses charged in the information, and that he had not waived the same. To this averment the State replied, admitting that the defendant did not have a preliminary examination, denying each and every other allegation in said paragraph of the plea, and averring that the accused waived his right to a preliminary examination. The defendant demanded a trial by jury upon the issue tendered by the ninth paragraph of the plea in abatement, which was overruled, and the trial court found that the defendant had waived a preliminary examination before the examining magistrate, and accordingly overruled said paragraph of the plea in abatement. The denial of a trial by jury to determine whether the right to a preliminary examination had been waived by the prisoner is assigned for error. Conceding for the purpose of this case that the accused was entitled to have this question passed upon by a jury, yet the refusal of this request did not work a reversal of the judgment of conviction. Doubtless he could have waived the calling of a jury to pass upon that proposition, had he so desired, since the statute does not specify how it shall be determined. It follows that the denial of a jury trial upon the issue in question was unimportant, as the defendant was in no manner prejudiced thereby. Suppose the uncontradicted testimony before the trial court had shown that a preliminary examination upon the crimes charged in the information has been waived by the defendant, he would not have been injuriously affected by the refusal of a jury to pass upon that portion of his plea, for had one been called the verdict must necessarily have been the same as the finding of the court. Error cannot be presumed, but must appear affirmatively to justify a reversal of a cause."

Here we have announced the doctrine that in a trial of a defendant for a high crime, though he may be entitled to have a jury pass upon an issue of fact as here admitted, yet the refusal of a jury trial in such case is not reversible error unless the accused can show affirmatively that he was prejudiced by the refusal; and this is said in face of the constitutional provisions of the state that guarantees the accused a trial by jury, and where a trial is defined as being an examination of an issue of fact. If that is due process of law within the State of Nebraska, then life, liberty and property is at least as safe under the laws and customs of the Sioux Indians.

The opinion of the court in *Hurtado vs California* was vigorously dissented from by Mr. Justice Harlan. Of the judges who concurred in that opinion, Mr. Justice Gray alone remains upon this bench.

It seems as if the doctrine there contended for by the State of California was carried to the very limit to which this court was then willing to go. It is with the conviction that it was there carried to the utmost limit that it ought to be carried that we have brought this case here.

To affirm the conviction of the plaintiff in error upon the record presented will be sweeping away the most stable barrier that protects life, liberty and property in the several states.

Respectfully submitted,

JOEL W. WEST,
Attorney for Plaintiff in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

HENRY BOLLN,
Plaintiff in Error.

v.

THE STATE OF NEBRASKA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

1. Henry Bolln, Plaintiff in error, was elected Treasurer of the city of Omaha for two terms. During his second term, in 1896, it was discovered that he was a defaulter. He was tried and convicted in the District Court of Douglas county of embezzling $105,000.00 of the public money. A sentence of nineteen years in the State Penitentiary and a fine of $210,000.00 were imposed upon him. In due time his

case was brought to the Supreme Court of the state by proceedings in error, where the judgment of the lower court was affirmed.

2. Section 124 of the Criminal Code of the State of Nebraska provides, *inter alia*, that:

"If any officer or other person charged with the collection, receipt, safe keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state, or to any county, or precinct, organized city or village, or school district in this state, shall convert to his own use, or to the use of any other person or persons, body-corporate, association or party whatever, in any way whatever, * * * * * every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall thus be converted, used, invested, loaned or paid out as aforesaid, which is hereby declared to be a high crime, and such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid." etc.

Section 286 of the same Code reads thus:

"Whenever a complaint in writing and upon oath, signed by the complainant, shall be filed with the magistrate, charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the arrest of the person accused, if he shall have reasonable grounds to believe that the offense charged has been committed."

A complaint was filed in due form before the proper magistrate, charging Bolln with embezzlement, under the provisions of Section 124, *Supra*, and a warrant was issued thereon for his apprehension.

Section 294 of the same Code is as follows:

"Whenever any person has been arrested under a warrant as provided in the preceding sections of this chapter, it shall be the duty of the officer making the arrest to take the person so arrested before the proper magistrate; and the warrant by virtue of which the arrest was made, with the proper return endorsed thereon and signed by the officer, shall be delivered to such magistrate."

Bolln was arrested and brought before the proper magistrate.

Section 297. The following are sections of the same Code:

"When it shall become necessary to adjourn any trial according to the provisions of the preceding section, the person accused may enter into a recognizance before the magistrate, with good and sufficient security to be approved by the magistrate, in such amount as he shall deem reasonable, conditioned for the appearance of such person before said magistrate, at a place and day and hour in said recognizance specified; *Provided*, That such adjournment shall not be for a longer time then twenty days without the consent of the accused; *And provided*, That no person shall be let to bail who is charged with an offense not bailable under the constitution of this state."

Section 300.

"When the complaint is for a felony, or for an offense for which the fine can exceed one hundred dollars, or the imprisonment can exceed three months, upon the accused being brought before the magistrate he shall proceed as soon as may be, in presence of the accused, to inquire into the complaint."

Section 302.

"If, upon the whole examination, it appears that there has been no offense committed, or that there is not a probably cause for holding the prisoner to answer the offense, he shall be discharged."

Section 306.

"It shall be the duty of every magistrate in criminal proceedings to keep a docket thereof as in civil cases. All recognizances taken under this title, together with a transcript of the proceedings, where the defendant is held to answer, shall be certified and returned forthwith to the clerk of the court at which the prisoner is to appear. The transcript shall contain an accurate bill of all the costs that have accrued, and the items composing the same."

Section 307.

"If the offense for which the prisoner is held to answer be bailable, and the prisoner offer sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court in which the same is cognizable on the first day of the next term thereof, and not to depart such court without leave, and thereupon he shall be discharged."

Section 578.

"That the several courts of this state shall possess and shall exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of like prosecutions upon indictments."

Section 579.

"All informations shall be filed during term, in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and endorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise prescribe, he shall endorse thereon the names of such other witnesses as shall be then known to him."

Section 581.

"That the provisions of chapters XL, XLI, XLII, XLIII, XLIV, XLV, of the Criminal Code, in relation to indictments, and all other provisions of law applying to prosecutions upon indictments to writs, and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments, or the execution of any service and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to information, and all prosecutions and proceedings thereon."

Section 585.

"No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as provided by law, before a justice of the peace or other examining magistrate or officer, *unless such person shall waive his right to such examination:* Provided, however, That information may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed may be demanded by the governor of this state of the executive authority of any other state or territory, or of any foreign government, in the same manner, and the same proceedings may be had thereon, as provided by law in like cases of demand upon indictment filed."

Plaintiff in error WAIVED his preliminary examination and was bound over to the District Court. Afterwards, but in due time, the prosecuting attorney of Douglas County, the County in which the offense was committed, filed in that court, the court having jurisdiction of such cases, an information charging the same offense charged in the complaint filed before the magistrate.

Section 439 of the same Code provides:

"The accused may except to an indictment by: First—A motion to quash. Second—A plea in abatement. Third—A demurrer."

It will be remembered that by the terms of Section 581, *supra*, the provisions of the Criminal Code, in relation to indictments, are made applicable to informations.

Section 451 of the same Code provides:

"If the issue on the plea in bar be found against the the defendant, or if upon the arraignment the accused offer no plea in bar, he shall plead "guilty" or "not guilty", but if he plead evasively, or stand mute, he shall be taken to have pleaded "not guilty."

Bolln first filed a motion to quash for these, among other, reasons:

"That there is no authority of law under and by which the County Attorney is authorized to file an information charging this defendant with a felony."

"Because this prosecution is in contravention of *Section 1* of *Article 14*, of the constitution of the United States of America by which the state of Nebraska has been forbidden to deprive this defendant of life or liberty without *due process* of law."

The foregoing are the only provisions of the motion which, by any possible construction, can be said to refer to a federal question.

The motion also contained these paragraphs:

"Because the crime charged in the information is different from the crime charged in the information which was filed before the Police Judge as the basis of this prosecution."

"Because the defendant has had no preliminary examination touching the crime charged in this information, nor did he waive the same."

The motion was overruled. Bolln then filed a plea

in abatement which repeats paragraphs 1, 2, 3, 4, 8 and 9 of the Motion to Quash, but adds nothing thereto with respect to the subject covered by these paragraphs.

The state demurred to the plea, and the demurrer was sustained to all but the ninth paragraph. Afterwards, leave of the court having been first obtained, the state replied to that paragraph thus:

"Comes now the plaintiff, The State of Nebraska, and by leave of Court first had and obtained, for Reply to the ninth paragraph of the defendant's Plea in Abatement, heretofore filed herein, denies each and every allegation in said paragraph contained, except as herein expressly admitted.

Plaintiff admits that defendant has had no preliminary examination for said crime referred to in said 9th paragraph, but alleges that said defendant did waive said preliminary examination and his right thereto, as shown by the *records* of the court."

The plea was overruled. The prisoner was arraigned; he stood mute, and the court entered a plea of "not guilty" for him.

A trial was had and a verdict of "guilty" returned.

In due time a motion for a new trial was filed. It contained 273 assignments of error. We do not deem it necessary to call attention to more than three thereof.

"The Court erred in overruling the defendant's motion to quash, filed April 4th, 1896.

The Court erred in sustaining the demurrer of the State to the first paragraph of the defendant's plea in abatement.

The Court erred in sustaining the demurrer of the State to the fourth paragraph of the defendant's plea in abatement."

The motion to quash, it will be remembered, states

only two grounds, the first and fourth, which could be said to relate, in any way, to a federal question. And the plea in abatement sets forth the same grounds in the first and fourth paragraphs thereof. In no other place does the motion for a new trial state, or attempt to state, a federal question, or challenge the attention of the trial court to the claim of the prisoner that he had been, by it, deprived of a right under the constitution or laws of the United States.

The motion was overruled and judgment pronounced on the verdict. Within the time fixed by law, the case was taken to the Supreme Court of the state by Bolln.

In the assignment of errors, which he filed in that Court, he stated all the federal questions relied on, if indeed he relied on any at that time, in the following assignments:

Assignment 66:

"The Court erred in overruling defendant's motion to quash, filed April 4th, 1896."

[It will be remembered that the first and fourth paragraphs of the motion to quash, are the only ones which can be said to have any reference to a federal question. They are as follows:

1. "That there is no authority of law, under and by which the county attorney is authorized to file an information charging this defendant with a felony."

4. "Because this prosecution is in contravention of Section 1 of Article 14 of the Constitution of the United States of America by which the State of Nebraska has been forbidden to deprive this defendant of life or liberty without due process of law."]

Assignment 67:

"The court erred in sustaining the demurrer of the State to the first paragraph of defendant's plea in abatement."

[That paragraph reads thus:

"That there is no authority of law, under and by which the county attorney is authorized to file an information charging this defendant with a felony."]

Assignment 70:

"The court erred in sustaining the demurrer of the state to the fourth paragraph of defendants plea in abatement.

[The fourth paragraph reads thus:

"Because this prosecution is in contravention of Section 1, Article 14 of the Constitution of the United States of America, by which the State of Nebraska has been forbidden to deprive this defendant of life or liberty without due process of law."]

From the foregoing it appears that assignments 67 and 70 cover the same ground as assignment 66, and all point to only one part of the Federal Constitution; viz: Sec. 1 of the 14th amendment.

It is a rule of decision of the Supreme Court of Nebraska, that assignments of error not referred to or argued in the brief, will be deemed waived.

Peaks v. Lord, 42 Nebr., 22. "There are some assignments of error which are not referred to in the brief of plaintiff in error, and in accordance with the established rule of this court these will be deemed waived and not further noticed."

Madsen v. The State of Nebraska, 44 Nebr., 631. (632.) This is a criminal case. We quote therefrom: "It has more than once been held that assignments in a petition in error not argued in the brief will be considered waived."

Kaufmann v. Cooper, 46 Nebr. 644. (650.) "Errors were assigned and the action of the trial court

in admission of evidence, but they were not argued in the brief of plaintiff in error, hence will be treated as waived."

Wood Mowing and Reaping Machine Co. v. Gerhold 47 Nebr., 397, (398.) "The petition in error contained six assignments, but two of which — the verdict is contrary to the evidence, errors in the admission testimony, — are argued in the brief. The other assignments are deemed waived."

Bolln v. The State, 51 Nebr., 581 (584.) (This case.) "While we are confronted with a record of over 1,000 pages, and a petition in error containing 279 assignments, the questions to be determined are not numerous, since most of the assignments are not discussed in the brief of defendant below. The familiar rule that assignments not relied on the briefs are deemed waived will be adhered to in this case."

Neither in the trial court or in the Supreme Court, was any reference made to any federal statute.

Neither in the trial court or in the Supreme Court, was any reference made to any provision of the constitution of the United States except Section 1 of Article 14 of the amendments to the Constitution of the United States.

The part of the brief of plaintiff in error in the court below which contains any reference whatever to federal questions, is set out in the certificate of the Chief Justice, printed in the record. We invite the especial attention of the court to this paragraph of that brief:

"*We do not question* the *authority* of the *legislature* to provide by suitable enactments for the trial of persons for information for felonies and what has been above said in argument has been so said with special reference to the case of *Miller v. The State*

45 N. W. 451, and we respectfully submit that none of the questions above discussed, seem to have entered into a consideration of that case." (Record p—)

The Supreme Court of the State of Nebraska affirmed the decision of the court below on May, 18th, 1897. Under the rule of the court, the plaintiff in error had forty (40) days within which to file a motion for rehearing. This motion was never filed.

ARGUMENT AND BRIEF OF THE LAW.

Points.

I. Whatever federal questions may be set up in the record, none of them were presented to the state Supreme Court for its judgment. But on the contrary all such questions were expressly, as well as by implication of law, waived by the plaintiff in error, and the court did not pass on, or consider, any of them.

II. The judgment of the state Supreme Court was on local grounds which are sufficient to sustain it, and, hence, this court is without jurisdiction to review it.

III. But if the foregoing propositions be resolved against us, we shall then contend that the only right "set up or claimed" in the state Supreme Court, is the right of "due process of law" AS SECURED BY SECTION 1 OF THE 14TH AMENDMENT to the federal constitution, for the reason that plaintiff in error in his assignment of errors in that court, *expressly* claimed that right, under that section, and did not claim it, or any other right, un-

der any *other* section of the constitution, or under any federal statute, either specifically or generally.

IV. Due process of law, as secured to the plaintiff in error under Section 1 of Article 14 of the amendments to the Constitution, was not denied to him by the state, in holding him to answer, for the crime of embezzlement, on the information of the county attorney, instead of on the presentment or indictment of a grand jury.

V. Neither was it denied to him by the refusal of the court to submit to a jury the issue raised by his plea in abatement.

VI. Neither the fifth nor the sixth amendment to the Federal Constitution, in itself, limits the power of the state, and, hence, neither forbids the legislature to pass a law giving to county attorneys the power to bring persons, charged with felonies, to trial on an information duly filed.

VII. The enabling act does not apply the restrictions of the fifth and sixth amendments of the federal constitution to the State of Nebraska, for these reasons, among others which will be stated when we come to discuss this point, that the state was not admitted under the enabling act; that the declaration required by the first sentence of the fourth section of the enabling act, and upon which plaintiff in error bases his contention that the restrictions of the fifth and sixth amendments are applicable to the state, was never made; and that the act of February 9th 1867 admitting the state did not require the making of the declaration.

I.

Whatever federal questions may be set up in the record, none of them were presented to the Supreme Court for its judgment, but on the contrary all such questions were expressly, as well as by implication of law, waived by the plaintiff in error, and the court did not pass on, or consider, any of them.

1st. FEDERAL QUESTIONS EXPRESSLY WAIVED;

Counsel for plaintiff in error, in his brief in the Supreme Court of the state, uses this language:

> "We do not question the authority of the legislature to provide by suitable enactment for the trial of persons upon information of felonies and what has been above said in argument has been so said with special reference to the case of *Miller v. The State*, *45 N. W. 451*, and we respectfully submit that none of the questions above discussed seemed to have entered into a discussion of that case." (Record, Page)

He thus told the court in very clear and unmistakable phrase that he did not "set up or claim" any "right, title or immunity" under the federal constitution; that he admitted the power of the legislature to authorize the county attorney to bring to trial on information persons charged with felonies. He now denies that power, and says in this court that under the provisions of the fifth amendment to the Federal Constitution, made applicable by the enabling act, the legislature of the state was prohibited the power to hold any person to answer for a felony, "unless on presentment or indictment of a grand jury." He now denies what he then expressly asserted. Will he be permitted to do that? We think not. We think he will not be

heard to assert a right in this court which he said in the state court did not belong to him.

To make it clearer, if such be possible, that plaintiff in error did not have in mind, when he presented his case to the state Supreme Court, the rights which he now claims under the Enabling Act, and the fifth, sixth, and fourteenth amendments to the Constitution, let us turn back a few pages of his brief in that court, and, commencing where he commences his discussion of the power of the county attorney to prosecute on information filed, examine critically the ground upon which he denies that power, and we will see that his waiver or admission, quoted above, is only the logical sequence of the argument that precedes, and, hence, that it is not an incautious remark. (See record p)

He first quotes the provisions of the state constitution which says that:

"The state legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor and may, by law, abolish, limit, change, amend or otherwise regulate the grand jury system."

Next he declares that in criminal, as well as in civil cases, there must be an issue of fact made by proper pleadings.

He then points out how, in early times, the power to bring persons to trial on information filed by the public prosecutor, was abused, and that this abuse led to the establishment of the rule, that none could be made to answer except on indictment duly returned by a grand jury. And then he follows with this statement:

"It would seem then that nothing short of a legislative enactment in the plainest and most unequivocal

language would be sufficient to take away so valued an immunity, and no legislative enactment should be permitted by mere implication to do so."

He thereby concedes, if not expressly, certainly by necessary implication, that it was in the power of the legislature to empower county attorneys to bring persons to trial for felonies on information. But he insists that such power must be conferred by a legislative enactment in the plainest and most unequivocal language.

After calling attention to his client's refusal to plead he continues: "The sole authority for the prosecution of offences by information is found in Chapter 54 of the Code." The next three paragraphs give abstracts of certain provisions of that chapter, and then he states that:

"Nowhere in the act is there any express language that an accused shall be held to answer to the information of a public prosecutor, as the language of the constitution gave authority to the legislature to provide by appropriate legislation. In the whole act there is nothing more than a bare implication that an accused should be required to enter a plea."

He further says: "The language of the Constitution *gave authority* to the legislature to provide by appropriate legislation" for the prosecution of persons charged with felonies on information, and his only complaint is, that the language of the act of the legislature, under which that power is claimed, is not sufficiently clear; that if such power exist, it was conferred, not in express terms, as it should have been, but by "nothing more than a bare implication."

Having thus stated his position, he declares in the next paragraph that "upon this ground the defendant claims that his trial upon the information of the county attorney was not only in contravention of the article

of the constitution referred to but was also in contravention of Section 3 of Article 1 of our constitution and also of Section 1 of Article 14 of the Constitution of the United States. Both of which provisions guarantee that no person shall be deprived of life or liberty without due process of law and we now claim for our client the protection of those constitutional provisions."

It will be noticed, that this is his first reference to the federal constitution in his brief, and that he places his claim to protection, under that instrument, on the fourteenth amendment thereto, and not on any other amendment or provision. He declared, "And we now claim for our client the protection of those constitutional provisions." What constitutional provisions? Section 10 of Article 1, and Section 3 of Article 1 of the State Constitution; and Section 1 of Article 14 of the Constitution of the United States. And the nature of his claim, as he puts it, is that the act of the legislature of the state, under which he was held to answer on the information of the county attorney, did not say in "express language, that an accused shall be held to answer to the information of a public prosecutor"; that there is "nothing more than a bare implication" that he should be so held; that this implication was not enough to warrant the conclusion that he should be so held; and, hence, that there was no power to hold him, and that, in holding him, he was deprived of his liberty without due process of law, within the meaning of the fourteenth amendment. He does not claim that the fourteenth amendment, or any other amendment for that matter, *prohibited* the *legislature* from passing such an act, but claims, simply, that the act does not provide for prosecutions on information. In other words, while admitting the power of the legislature to pass the act, he denied that it had exercised the power con-

ferred upon it by the constitution. Manifestly the question thus raised is a local, a state, question, and not a federal question.

In the next paragraph of his brief he continues thus, "Again the provisions of the chapter referred to are vastly wider in their scope than the title of the act would indicate." Whether they are or not, is a local question.

The same paragraph has this to say: "Nor is there anything in the title 'prosecution of offences by information' that would challenge the attention of the legislator that the bill was intended to be so far reaching as to provide for the prosecution of offences of the gravity of felonies — that is where the punishment was by imprisonment in the penitentiary — by information of a public prosecutor and thereby supply such legislative authority as might be permissible under Section 10, Article 1, of the Constitution."

His complaint is, that the title of the act under which he was prosecuted was not broad enough; that there was nothing in it "which would challenge the attention of the legislator" to what the act contained. Purely a local question. Following this complaint, he again admits in the closing phrase of the paragraph the authority of the legislature, under Section 10, Article 1 of the state Constitution, to pass such an act.

He then says that if the act is unconstitutional, the court should so declare; and in the next paragraph admits again the power of the legislature to pass such an act. His language is: "And the constitutional permission is for the legislature to enact by appropriate legislation for the prosecution of felonies by information."

In the paragraph that follows next, he returns to

a discussion of the title of the act, and says that there is nothing in it that would lead one to suppose that it conferred power on the public prosecutor to prosecute on information.

Then he gives the second and third sections of the act for the purpose, obviously, of supporting his contention that they do not, by express terms, confer the power of prosecution by information. He says of them "These proceedings [provisions] merely point out a procedure, and give no authority for the procedure itself."

The next paragraph deals with the section providing when grand juries shall be called. And he says of it, that it is absolutely void because it "could have no force unless it had been enacted as an amendment to that chapter", meaning Chapter 29 referred to by him a few lines above.

Following this immediately, is the paragraph quoted by us at the opening of the discussion under this head, in which counsel expressly admitted the power of the legislature to pass the act conferring upon county attorneys authority to hold men charged with felonies to answer on information, a power which he now denies, in this court. From the foregoing it is manifest:

1. That counsel for plaintiff in error did not deny in the state court the right of the legislature to empower, by suitable enactment, county attorneys to prosecute for felonies on information properly filed, but, on the contrary, that he expressly admitted that power.

2. That his claim in that court was, that the legislature had not conferred that power by suitable enactment, and that in holding his client to answer on an

information, not authorized by a state law, passed in conformity with the manner provided by the state constitution, he was deprived of his liberty without due process of law within the meaning of the 14th amendment.

Therefore, whether he was, or was not, so deprived, depends solely on the question, whether the legislature of the state had exercised its conceeded power, to pass the law complained of, in accordance with the provisions of the STATE constitution—a purely local matter.

That plaintiff in error, when in the Supreme Court of the state, did not think of raising any of the federal questions which he presents in this court, is, consequently, quite clear from the record. Mr. Justice Harlan said in *Kipley v. Illinois, 170 U. S. 187:*

"It is manifest, that when the answer was drawn, neither the defendant Kipley nor the learned counsel representing him intended to raise any question of a federal nature. We cannot suppose that it occured to either of them at that time that the civil service of Illinois was repugnant to the Constitution of the United States."

So it may be said in this case, that it is manifest it did not occur to either the plaintiff in error or his counsel while in the court below, that the legislature of the State of Nebraska was prohibited, by the federal constitution, from passing a law authorizing the county attorney to hold persons charged with felonies to answer on information duly filed.

2. FEDERAL QUESTIONS WAIVED BY IMPLICATION OF LAW.

As we have just attempted to show, plaintiff in error did not argue in his brief in the state Supreme

Court any federal question. Therefore, even if this court should be of opinion that in his petition in error, or otherwise, he set up or claimed a right under the federal constitution, or under a federal statute, in that court, such right was waived by him in the Supreme Court of the State, for it is a rule of decision in that court that all points not argued in the brief are deemed waived.

Peaks v. Lord, 42 Neb., 22. "There are some assignments of error which are not referred to in the brief of plaintiff in error, and in accordance with the established rule of this court these will be deemed waived and not further noticed."

Madsen v. The State of Nebraska, 44 Nebr., 631. (632). This is a criminal case. We quote therefrom: "It has more than once been held that assignments in a petition in error not argued in the brief will be considered waived."

Kaufmann v. Cooper, 46 Nebr., 644. (650). "Errors were assigned and the action of the trial court in admission of evidence, but they were not argued in the brief of plaintiff in error, hence will be treated as waived."

Wood Mowing and Reaping Machine Co., v. Gerhold, 47. Nebr., 397. (398). "The petition in error contained six assignments, but two of which—the verdict is contrary to the evidence, errors in the admission of testimony—are argued in the brief. The other assignments are deemed waived."

In this very case—the case at bar—when it was before that court the rule announced in the foregoing case was announced and enforced in the following language:

"While we are confronted with a record of over 1,000 pages, and a petition in error containing 279 assignments, the questions to be determined are not

numerous, since most of the assignments are not discussed in the brief of defendant below. The familiar rule that assignments not relied on in the briefs are deemed waived will be adhered to in this case."

Plaintiff in error was familiar with that rule, and, therefore, in failing to argue the federal question, set up in his assignment of errors in the state court, he knowingly waived them, if it was competent for him to do so. Was it? The statute, under which this court takes jurisdiction of such cases as this, contemplates that he might, for it says, in effect, that only those federal rights which are "set up or claimed" may be considered by this court. Even though the plaintiff in error should have a right under the federal constitution, or a federal statute, if he failed to set it up or claim it in the lower court, he could not ask to have it enforced in this court. He would be deemed to have waived it.

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one.

Pierce v. Somerset R. R. Co., 171 U. S. 641, (648).

3. THE STATE SUPREME COURT DID NOT PASS ON OR CONSIDER ANY FEDERAL QUESTION.

This is shown by the quotation which we have just given from the opinion of that court. It deemed all questions waived which were not argued. The federal question presented in the petition in error, if there was one presented there, was not argued, and, hence, was deemed waived.

II.

The judgment of the state Supreme Court was on local grounds which are sufficient to sustain it, and, hence, this court is without jurisdiction to review the judgment.

1 The Supreme Court of Nebraska decided, in effect, as we have just shown, that the federal questions set up in the record, if there were any, were waived by the plaintiff in error under the practice existing in that court. Whether he did or not, was purely a local question, and the decision thereon will not be reviewed by this court. A decision on a question of practice by which a party is prevented from having a federal question presented to the state court for its consideration and judgment, is not reviewable in this court.

In Kipley v. Illinois, supra, the defendant made application to the Supreme Court of the state, where the action was originally brought, for leave to file an amended answer, which set up certain federal questions. That court denied the application. Judgment finally went against Kipley. He then took the case to this court for review. The only federal questions upon which he relied for that review were those set up in the amended answer which the Supreme Court of Illinois would not permit him to file. And the question presented to this court, for decision was whether or not it would hold that the federal questions relied on were properly set up in the lower court so as to give this court jurisdiction to review them. The court, speaking through Mr. Justice Harlan, said:

"This action of the state court does not raise a federal question which this court can examine."

Continuing the learned justice observed: "The suggestion that the Federal questions which would

have been raised, if the answer had been amended as proposed, should be considered upon their merits precisely as they might have been if the motion to amend had been allowed, cannot be entertained for a moment."

In the Kipley case the state court was called upon to pass on a question of practice in that court, that is, whether or not the defendant was entitled, under the circumstances then presented to the court, to file his amended answer, and it decided that question adverse to the defendant, and thus, in effect, cut him out of the right to set up certain rights which he claimed under the federal constitution. In the case at bar, the Supreme Court of Nebraska was called upon to pass on a question of practice, as to whether or not the federal questions raised in the petition in error were before the court for its consideration and judgment, and it decided that under the practice in that court they were not. There was nothing in the Illinois case according to the opinion of this court to justify the conclusion that the ruling on the motion to file the amended answer was prompted by a desire to deprive Kipley of any right or immunity which he might have under the federal constitution. And so it must be held with respect to the action of the Supreme Court of Nebraska, that it had no intent, when deciding that all questions not argued were waived, to deprive Bolln of any right or immunity which he might have under the federal statutes or constitution, for in that decision the court was following a long line of its own adjudications.

The state Supreme Courts in both cases did not consider the federal questions relied on in this court, because of a rule of practice in those courts which prevented the questions from coming before the court

for consideration and judgment. Therefore we submit, that the rule in the Kipley case should be the rule in this case.

The judgment of the lower court in this case rests:

1. On the rule of practice that points not argued in the brief are deemed waived; that the federal questions, if any, set up or claimed in the assignment of errors, were not argued in the brief and, hence, were waived by plaintiff in error, and

2. On the construction of state statutes and principles of general law, as distinguished from the federal constitution and federal statutes.

These grounds were sufficient to sustain the judgment, and, hence, this court will not review it. The following authorities are in point:

Seneca v. Christie, 162 U. S. 283. (289.) "As it appears that the decision of the court of appeals was based in addition to other grounds, upon a distinct and independent ground not involving any federal question and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rule on that subject and cannot be maintained."

Eustis v. Bolles, 150 U. S. 361. (366.) Mr. Justice Shiras says: "it is likewise a settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, and another question not federal has been raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the federal question to sustain the judgment, this court will not review the judgment."

Pierce v. Somerset R. R. Co., 171 U. S. 641. (648.) "That is a federal question. The other related to the defense of estoppel on account of laches and

acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the state court. In such case a writ of error to the state court cannot be sustained."

2. THE HOLDING OF THE COURT, WITH RESPECT TO THE CLAIM OF THE PLAINTIFF IN ERROR, THAT HE WAS DENIED DUE PROCESS OF LAW BY BEING REFUSED A TRIAL BY JURY OF THE ISSUE RAISED BY THE PLEA IN ABATEMENT AND THE REPLY THERETO.

The decision of the court with respect to this claim, was upon a ground purely local, and quite sufficient to sustain it. The ground was, that plaintiff in error did not bring the question properly before the court. Here is the language of the decision on that point:

"The testimony adduced relating to the plea in abatement was not brought into the record by a bill of exceptions, nor is the transcript of the proceedings in the magistrate's court before us, therefore we are unable to determine whether the court below erred in denying the accused a trial of his plea in abatement by a jury. The issue of fact joined on this plea in abatement, involving as it did the question of a record in the case at bar, could be properly determined by the court without the intervention of a jury."
Bolln v. State, 51 *Nebr.* 581. (587.)

III.

But if the foregoing propositions be resolved against us, we shall then contend that the only right "set up or claimed" in the state Supreme Court is the right of "due process of law," as secured by Section 1 of the 14th amendment to the federal constitution; for the reason that plaintiff in error in his assignment of errors in that court

expressly claimed that right under that section, and did not claim it, or any other right, under any other section of the constitution, or under any federal statute, either specifically or generally.

Let us examine what plaintiff in error claims in *this* court, and, if it be a right protected by the federal constitution, or a federal statute, whether he claimed it in the state court. The first assignment of error is in substance:

(a) That under Section 11, Article 1 of the State Constitution, the court erred in denying him a trial by jury of the issue of fact tendered by his plea in abatement—purely a local question.

(b) That by that denial, he was deprived of due process of law contrary to Section 1 Article 14 of the Amendments to the Constitution. In the court below nothing was said about that denial violating any of his federal rights.

The second assignment of error is in substance:

That the enabling act, and the action of the members of the Constitutional Convention thereunder, made the sixth amendment to the federal constitution a limitation on the power of the state legislature, and that the court, by the denial set forth in the first assignment, deprived him of a right under the sixth amendment. No mention of this amendment was made in the state court, nor was there any intimation given that he claimed any right under it. Neither was there any reference in that court to the Enabling Act. He, as we have seen, and shall see hereafter, limited his federal right to due process of law under the 14th amendment.

The 3rd Assignment asserts, in effect, that by the

same denial he was deprived of due process of law under the *14th* Amendment. No claim, as we have already seen, was made in the lower court that a denial of a jury trial of this issue violated any right which plaintiff in error had under the 14th, or any other, amendment, or under any federal statute.

The 4th Assignment asserts, in effect, that Chapter 54 of the Criminal Code is in conflict with the state constitution—a local question, purely.

The 5th Assignment asserts, in effect, that the court erred in holding that Chapter 54 of the Criminal Code authorized the prosecution of felonies by information, and thus deprived the plaintiff in error of due process of law under the 14th Amendment. This was claimed at one time in the state court, and, if it can be said to present a federal question, it is the only one there asserted.

The 6th Assignment is, in effect, that the holding referred to in the 5th Assignment, violated a right which Bolln claimed under the 5th Amendment to the federal Constitution, as made applicable to the State of Nebraska by the Enabling Act and the action of the members of the convention thereunder. This right was not claimed in the state court. No reference whatever was made in that court to the 5th Amendment or the Enabling Act, and no right was claimed which would clearly point out to the court, that Bolln claimed anything under that amendment or act. Indeed, there is nothing in the record that even intimates any claim under the 5th Amendment, or under the Enabling Act.

The 7th Assignment is, in effect, that the judgment of the court deprived him of due process of law under the 14th Amendment. This Assignment was not made in the lower court, unless it would follow as an inference

from the assignment, that he had been deprived of due process of law under the 14th Amendment in being required to answer for a felony on information instead of on an indictment.

The Record, therefore, is:

1. That he did not at any time in the lower court set up or claim, that the denial of a trial by jury of the issue of fact raised by his plea in abatement violated any federal right which he had.

2. That he did not claim that a right which he had under the 6th Amendment to the Constitution was violated.

3. That he did not claim that a right which he had under the Enabling Act was violated, and

4. That the only right which he claimed in that court was the right of due process, not generally, but only in so far as it was secured to him under the 14th Amendment, and which he attempts to set forth in the fifth assignment in this court.

Under this state of the record, we claim that in no event can this court review any question excepting one; which is, in effect, that plaintiff in error was denied due process of law, by reason of being compelled to answer for the crime of embezzlement on the information of the county attorney, instead of on an indictment by a grand jury; for the reason that, under the authorities which we shall now present, none of the other questions were properly raised in the court below.

California National Bank v. Thomas, 171 *U. S.* 441. "Unless the plaintiff in error was denied some right under the Constitution or statutes of the United States specially set up and claimed by it, this writ error must be dismissed."

Oxley Stave Co. v. Butler Co., 166 *U. S.* 64 (653.)

"Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

We may say in connection with this quotation, what we have already remarked more than once, that outside of the one claim, that plaintiff in error was denied due process because he was held to answer on information instead of an indictment, none was brought to the attention of the state court. And even that claim was expressly waived. And for ought that appears, the state court proceeded in its determination of the case without any thought that it was expected to decide a federal question.

"The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court."

Oxley Stave Co. v. Butler Co., supra page 655.

While it has been held by this court, that it is not necessary to set out in the court below the particular provision of the Constitution relied on, it has never been held, that it is not necessary to state that a right

is claimed under the Constitution or under a federal statute, as the case may be.

Mr. Justice Miller has stated this point forcibly in the case of the Bridge Proprietors, 1 Wallace, 116. We quote from page 143:

> "But the true and rational rule is that the court must be able to see clearly from the whole record that a certain provision of the Constitution, or act of Congress was relied on by the party who brings the writ of error and that the right thus claimed by him was denied."

Apply that rule to the case at bar. We claim, that it cannot be seen clearly, or at all, from the record in this case, that any provision of the Constitution, or of any Act of Congress was relied on by Bolln, excepting the 1st Section of the 14th Amendment, and that only to the extent that we have heretofore indicated.

The rule thus announced by Mr. Justice Miller was quoted and approved in

Green Bay etc. Canal Co., v. Patten Paper Co., 172 *U. S. 68.*

Pozzell v. Brunswick, 150 *U. S.* 433. (440.)

Mr. Chief Justice Fuller says in the latter case:

> "A definite issue as to the validity of the statute the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a Federal question by its decision."

To the possible suggestion, that there are some stray statements in the record to the effect that the act of the legislature complained of is "in violation of the Constitution," we call attention to the rule laid down in *Miller v. Cornwall R. R. Co.*, 168 *U. S.* 131. (134), which is in this language:

"It was long ago held that where it was objected in the state courts that an act of the State was 'unconstitutional and void' the objection was properly construed in those courts as raising the question whether the state legislature had the power under the state constitution to pass the act, and not as having reference to any repugnance to the Constitution of the United States."

The rule announced above is stated and enforced in *Kipley v. Illinois*, 170 *U. S.* 187.

In the case of *Miller v. Cornwall*, *supra*, it was claimed in the lower court, that one of the parties was denied due course of law. In this court the same party contended that, that claim raised a question under the Federal Constitution, but Mr Chief Justice Fuller, on page 134, said, that the presumption was that it referred to the State Constitution.

In conclusion we feel justified in claiming, that, under the foregoing authorities, the plaintiff in error raised but one question in the state Supreme Court, and that is, that he was denied due process of law under the 14th Amendment by reason of being compelled to answer for his crime on an information instead of an indictment, and that the other questions which he now raises in this court cannot be considered, because they were not "specially set up or claimed" in the court below. And this is, it seems to us, not only right upon authority but upon principle. There is absolutely nothing in this record to show, that the attention of the Supreme Court of the State was ever directed to any provision of the Federal Constitution, except Section 1 of the 14th Amendment., and afterwards the point was waived. The Enabling Act was never refered to in any of the pleadings or in the argument This being so does not the rule *expressio unius est*

exclusio alterius apply with controlling force. Plaintiff in error expressly and repeatedly claimed the protection of Section 1 of Article 14, and of no other provision of the Constitution or of any law of the United States, and this being so, by what system of reasoning can it be said that he specially set up or claimed a right under anyother provision of the Constitution, or under any Federal statute. If he claimed his right under the Federal Constitution generally, without specifically seting out any Section or article, then there might be some reason for contending that he invoked every right which by chance he might have under any provision of that instrument, and it might be said that every such right was brought to the attention of the court, and that, in deciding against him, the court denied the particular rights which he now asserts in this court. We say that might result where he claimed under the whole constitution, but that cannot be so where he claimed under only one provision, and thus, in effect, declared to the Supreme Court of the state, that he did not claim under any other provision — that he asked at its hands only the rights accorded to him by the 14th Amendment, so far as the constitution and laws of the United States were concerned.

The provisions of the constitution, outside of the 14th Amendment, under which he now claims rights are, as we have heretofore seen, the 5th and 6th Amendments. These amendments he cannot apply to himself, except through the Enabling Act. If that act did not say that the members of the constitutional convention "shall adopt the constitution of the United States" etc., he would not be now claiming any protection under the two last mentioned amendments. These amendments are limitations on the powers of

Congress and not on the powers of the state. So well is this settled, that we deem it necessary to cite only a few authorities:

Barron v. Mayor of City Council, 7 Peters, 243;
Fox v. State of Ohio, 5 How. 410.

Therefore under those amendments, the 5th and 6th, unaided by the Enabling Act, he would have no right at all. Nor does he claim either in his assignment of error or brief in this court, that he would have one. He bases his claim on the Enabling Act — an act of Congress which he says applies the 5th and 6th amendments to his case. A statute of the United States then is drawn in question. Under it he claims every right which he asserts in this court outside of the claim under the 14th Amendment.

Yet neither in the pleadings nor in his brief in the state court, did he give any intimation whatever of a claim under this Federal statute. It cannot be said, therefore, that a right twas "specially set up or claimed" under the Enabling Act, or any other Federal statute, in the court below.

And we, therefore, respectfully submit, that if plaintiff in error has a right to have any question examined in this court, he is limited to the one set up under the 14th Amendment, that is, that he was denied due process of law by being held to answer on an information, instead of on an indictment.

IV.

Due process of law, as secured to the plaintiff in error under Section 1 of Article 14 of the amendments to the Constitution, was not denied to him by the state, in holding him to answer for the crime of embezzlement on the information of the county attorney, instead of on the presentment or indictment of a grand jury.

1. Whether requiring the plaintiff in error to

answer for a felony on information filed, instead of the indictment of a grand jury, deprived him of due process of law under the 14th Amendment, has been settled by this court adverse to his contention.

Hurtado v. People, 110, *U. S.* 516 (538). After an examination of nearly all, if not all, the learning on the subject of what constitutes due process of law, the court, speaking through Mr Justice Matthews, stated its conclusion, thus:

"Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and committment by a magistrate, certifying the probable guilt of the defendant, with the right on his part to the aid of counsel and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprison of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments."

McNully v. California, 149 *U. S.* 645. Mr. Justice Fuller, discussing the same subject, said, on page 648:

"It was settled in *Hurtado v. California*, 110 *U. S.* 516, that the words 'due process of law' in the 14th Amendment did not necessarily require an indictment by a grand jury in a prosecution by a State for murder, whose constitution authorizes such prosecution by information."

Other courts have held to the same effect.

Rowan v. The State, 30 *Wis.*, 129. (149.) Judge Cole said, on the latter page:

"And the words 'due process of law,' in this amendment, do not mean and have not the effect to limit the powers of the state governments to prosecutions for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed forms and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change from time to time with the advancement of legal science and the progress of society, and if people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our state constitution as it now stands, and nothing in the 14th Amendment to the constitution of the United States which prevents them from doing so."

State v. Boswell, *104 Ind.* 541. (543). "It seems clear to us that one who is tried and convicted upon an information provided for by a constitutional state statute is not deprived of his liberty without due process of law, for we preceive no reason for doubting the soundness of the proposition that proceedings founded upon an information provided for by a legally enacted statute to constitute due process of law."

In Re Humason, *46 Fed. 388.* Judge Mumford had before him the statutes of the State of Washington, similar to the Nebraska statute with respect to trial of persons charged with felonies on information, and he was asked to decide, that such a statute did not afford the prisoner due process of law. Following the case of *Hurtado v. California*, *supra*, he said:

"That decision is conclusive. Since it was rendered hundreds of men have been proceeded against by information, and punished, and it is too late now to question the validity or constitutionality of state

laws authorizing prosecutions for local offences by information, or to longer maintain that an indictment by a grand jury is essential to "due process of law."

V.

Neither was due process denied to him under the 14 Amendment by the refusal of the Court to submit to a jury the issue tendered by his plea in abatement.

But first, how was this question raised? Did plaintiffs specifically set up or claim it in the court below? Did he ever even intimate in pleading or brief that he was thereby denied a right under the Federal constitution or an act of Congress. The record is plain and from it the answer must be known. Here is all he said about the claim in his petition in error in the Supreme Court of the state:

"The court erred in denying the demand of the defendant for a jury trial upon the issue of fact raised by the ninth paragraph of defendant's plea in abatement and the reply of the state thereto."

How did the court err? By not properly applying a state statute, or the state constitution or a principle of general law? It does not say. Certainly, then, he did not specially set up or claim a right under the Federal constitution, or a Federal statute, as required by the 25th Section of the judiciary act, and the decisions of this court interpreting the same.

In his discussion of this point in his brief in the state Supreme Court, which is presented in the certificate of the Chief Justice, made a part of the record here by stipulation, he in no place refers to the Federal Constitution or a Federal statute. The only right which he there claimed, with respect to this matter,

was a right under the Constitution and laws of the state. We are willing, however, to discuss it here.

To return to the question, did the refusal of the court to submit the issue to a jury deny plaintiff in error due process of law? He alleged in the 9th Paragraph of the plea that "the defendant has had no preliminary examination touching the crime charged in this information, nor did he waive the same."

To this the state replied:

> "Plaintiff admits that defendant has had no preliminary examination for said crime referred to in said ninth paragraph, but alleges that said defendant did *waive* said preliminary examination and his right thereto as shown by the *records* of the court."

The issue then for decision was, whether or not the records of the court showed that Bolln waived his preliminary examination. And that, of course, could be decided only by an inspection of the transcript of the record, sent up by the Examining Magistrate under Section 306 of the Criminal Code, which reads as follows:

> "It shall be the duty of every magistrate in criminal proceeding to keep a docket thereof as in civil cases. All recognizances taken under this title, together with a transcript of the proceedings, where the defendant is held to answer, shall be certified and returned to the clerk of the court at which the prisoner is to appear. The transcript shall contain an accurate bill of all the costs that have accrued, and the items composing the same."

Of the action of the trial court in denying Bolln a jury trial of the issue thus raised, the state Supreme Court in its opinion, on page 587, said:

> "The issue of fact joined on this plea in abatement involving as it did the question of a record in the

case at bar could be practically determined by the court without the intervention of a grand jury."

Is not this correct? We think it is. And we submit, that at common law, whenever the issue was to be settled by the inspection of the record, that issue was triable by the court alone. Such a trial was called trial by record. And of this trial, Blackstone, on page 329 of Book 3, says:

"This is only used in one particular instance; and that is where a matter of record * is pleaded in any action, as a fine, a judgment or the like."

After pointing out how the issue is tendered and joined, he observes, on the same page:

"The trial therefore, of this issue is merely by the record; for as Sir Edward Coke (b) observes, a record or enrollment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself."

Cooley's Blackstone, 3d Ed., Vol. 2, 190.

Tidd in his work on Practice, Vol. 2, page 744, says on the same subject:

"When the defendant pleads *nul tiel* record of a judgment &c., the record is commonly produced by the plaintiff; and in that case, the master in the King's Bench, who reads the issue and compares it with the record, will mark on the draft of the issue that the plaintiff hath produced the record; upon which the clerk of the rules will give a rule for judgment."

Andrew Steven's Pleadings, 189: "The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate made of trying such issue, and the parties cannot put themselves upon the country."

It may not be amiss to remark here that plaintiff

in error in his plea in abatement did not "put himself upon the country." If he was entitled to a trial by jury under the statute, this would not be necessary, but the statute does not say that he shall have a jury trial. Therefore, if he claims such trial according to the rules of the common law, he should have brought himself within those rules by "Putting himself upon the country." And for that reason, if for no other, he was not entitled to a jury trial.

Gray v. Pingry, 17 *Vt.*, 419. Judge Redfield, on page 422, said: "The issue formed upon the plea of *nul tiel* record could only be tried by the court, and should have been first tried, before it could be known that any issue for the jury would remain in the case."

Hill vs. The State, 2 *Yerg.* 248—9. "We are also of opinion that it was error to permit the jury to try *nul tiel* record. This was a matter to be tried by the court."

Epps Administrators vs. Smith, Administrator of Eagney, 4 *Munford*, 466. (467). The court said: "But that is also erroneous in so much thereof as decides on the first plea of any such record which if properly pleaded ought to have been decided by the court."

Martha v. The State, 26 *Ala.*, 72. (75). Chief Justice Chilton said on the latter page: "This was no invasion by the court of the province of the jury, for it was the duty of the court to declare the legal effect of the record insisted upon by the defendant as sustaining her pleas."

Hite v. State, 9 Yerg, 356. (380.) "If a jury had been sworn to try an issue upon *nul tiel* the court must have instructed them to find against the prisoner. Why then impanel a jury when the fact of identity

could not have been submitted to them. We are of the opinion that there was no legal necessity for it."

Brady v. Commonwealth, 1 Bibb, 517. "It was also erroneous to have tried the issue by jury instead of the court deciding it by the record."

Carter v. Wilson, 1 Dev. & Bat. 364. (Side paging.)

Boucher v. Williamson, 1 Dana, 227.

Carson v. Pearl, 4 J. J. Marsh, 92.

To conclude the discussion on this point, let us present the following from the opinion of Chief Justice Polland in the case of *The State v. Haynes*, 36 Vt., 667. (671.)

"But we understand that the defendants upon the introduction of these records of former convictions claimed a right to have the case submitted to a jury to determine whether they had been properly convicted or convicted at all of the prior offences as it was claimed these records showed."

Further down upon the same page the learned Chief Justice continues:

"These former convictions, by the rules of evidence applicable equally to civil and criminal trials, can be proved only by the records of the court, and what the records show, cannot be contradicted by any averment or proof."

"The question stood then upon the record of the former convictions alone, and the legal efficacy and effect of those was purely a question of law. Were the defendants entitled to have such question decided by a jury?"

Again on page 672:

"It is purely a question of law bearing upon the duty of the court, and not of the jury. To say that the defendants must have an opportunity to have this question of law submitted to a jury, so as to have

the benefit of the chance of their deciding it contrary to law, seems to us a very great absurdity."

From all of which it must be concluded, that plaintiff in error was not, according to due process of law, entitled to a trial by jury of the issue tendered by the 9th paragraph of his plea in abatement, and joined by the reply of the state.

VI.

Neither the fifth nor the sixth amendments to the Federal Constitution, in itself, limits the power of the state, and, hence, neither forbids the legislature to pass a law giving to county attorneys the power to bring persons, charged with felonies, to trial on an information duly filed.

Under the III. head of this brief the above proposition was discussed and supported by the citation of decisions of this Court. We do not think it necessary to say anything more here.

VII.

The enabling act does not apply the restrictions of the fifth and sixth amendments of the federal constitution to the State of Nebraska, for these reasons, among others which will be stated when we come to discuss this point, that the state was not admitted under the enabling act; that the declaration required by the first sentence of the fourth section of the enabling act, and upon which plaintiff in error bases his contention that the restrictions of the fifth and sixth amendments are applicable to the state, was never made; and that the act of February 9th 1867 admitting the state did not require the making of the declaration.

Before entering upon an examination of the above

proposition, it may be profitable to state a few facts in connection with the admission of Nebraska into the Union.

The Congress on the 19th of April 1864 passed an act entitled:

"An act to enable the people of Nebraska to form a constitution, and a state government, and for the admission of such state into the Union on an equal footing with the original states."

13 *United States Statutes at Large, page 47.*

The first section of this act provides

"That the inhabitants of that portion of the Territory of Nebraska included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves a constitution and state government, with the name aforesaid, which state, when so formed, shall be admitted into the Union as hereinafter provided."

Section 2 defines the boundaries of the new state.

The third section provides for a constitutional convention, declares that the members thereof shall be elected on the first Monday in June thereafter, and authorizes the people of the territory

"to vote upon the acceptance or rejection of such constitution as may be formed by said convention."

The fourth section provides,

"That the members of the convention thus elected shall meet at the capitol of said territory on the first Monday in July next, and after organization shall declare, on behalf of the people of said territory, that they adopt the constitution of the United States; whereupon the said convention shall be, and it is hereby, authorized to form a constitution and state government; Provided, That the constitution when formed shall be republican, and not repugnant to the constitution of the United States and the principles of the Declaration of Independ-

ence: And provided further, That said constitution shall provide, by an article forever irrevocable, without the consent of the Congress of the United States: First. That slavery or involuntary servitude shall be forever prohibited in said state. Second. That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship. Third. That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States, and that the lands belonging to citizens of the United States residing without the said state shall never be taxed higher than the land belonging to residents thereof; and that no taxes shall be imposed by said state on lands or property therein belonging to or which may hereafter be purchased by the United States."

The fifth section provides:

"And be it further enacted, That in case a constitution and state government shall be formed for the people of said territory of Nebraska, in compliance with the provisions of this act, that said convention forming the same shall provide by ordinance for submitting said constitution to the people of said state for their ratification or rejection at an election to be held on the second Tuesday of October, one thousand eight hundred and sixty-four, at such places and under such regulations as may be prescribed therein, at which election the qualified voters, as hereinbefore provided, shall vote directly for or against the proposed constitution, and the returns of said election shall be made to the acting governor of the territory, who, together with the United States district attorney and chief justice of said territory, or any two of them, shall canvass the same, and if a majority of legal votes shall be cast for said constitution in

said proposed state, the said acting governor shall certify the same to the President of the United States, together with a copy of said constitution and ordinances; whereupon it shall be the duty of the President of the United States to issue his proclamation declaring the state admitted to the Union on an equal footing with the original states, without any further action whatever on the part of congress."

There are nine other sections of the act, but as they have no bearing on the question now under consideration, we omit all further reference to them.

Pursuant to the terms of this enabling act, the people of the territory selected delegates to the constitutional convention, and those delegates met in convention on the day fixed in the act. But the people of the territory not being willing at that time to assume the responsibility of statehood, the convention adjourned without taking an action beyond its own organization. We present in this connection the following pertinent extract from the opinion of the Supreme Court of Nebraska in

Brittle v. The People, 2 *Nebraska* 198.

"In April 1864, Congress passed an enabling act, providing for the election, in June of that year, of delegates, who should meet in convention in July following, for the purpose of framing a constitution, with a view to the admission of Nebraska as a state into the Union. The sentiment of the people at that time being opposed, evidently, to becoming a state, the delegates chosen in the manner provided, upon meeting, refused to make a constitution, and adjourned *sine die*.

"Without any further act of Congress, the territorial legislature of 1866 submitted a proposed constitution to the electors, to be voted on in June of that year, with direction to choose, at the same time,

legislative, executive, and judicial officers for the proposed State. The governor, secretary of state, and auditor of the Territory, were, by the act submitting the instrument, constituted a board of canvassers; and they declared the constitution adopted by a majority of a hundred.

"The legislature thus chosen assembled in July, the time prescribed, and chose two senators to represent the State, who, together with the representative in Congress, took the proposed constitution to Washington, and prayed Nebraska's admission."

On the 9th of February 1867 the Congress passed another act entitled:

"An act for the admission of the State of Nebraska into the Union."

This act was passed the first time by the senate, after a long and stormy debate; was vetoed by President Johnson, and was passed over his veto. The following are the material parts thereof:

"Be it enacted etc., That the constitution and state government which the people of Nebraska have formed for themselves be, and the same is hereby, accepted, ratified and confirmed, and that the said State of Nebraska shall be, and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States, in all respects whatsoever."

Sec. 2. "That the State of Nebraska, shall be, and is hereby declared to be entitled to all the rights, privileges, grants, and immunities, and to be subject to all the conditions and restrictions of an act entitled 'An act to enable the people of Nebraska to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states.' Approved, April nineteenth, eighteen hundred and sixty-four."

Sec. 3. "This act shall not take effect except upon the fundamental condition, that within the State of Nebraska, there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed; and upon the further fundamental condition, that the legislature of said state, by a solemn public act, shall declare the assent of said state to the fundamental condition, and shall transmit to the President of the United States an authentic copy of said act; upon receipt whereof the president, by proclamation, shall forthwith announce the fact, whereupon, said fundamental condition shall be held as a part of the organic law of the state, and thereupon, and without any further proceeding on the part of Congress, the admission of state into the Union shall be considered as complete. Said State Legislature shall be convened by the Territorial Governor, within thirty days after the passage of this act, to act upon the conditions submitted herein."

Pursuant to this act, the Territorial Governor issued his proclamation, reciting the third section of the act verbatim, with the exception of the last sentence, and concluding thus:

"Now, therefore, I, Alvin Saunders, Governor of the Territory of Nebraska, do call upon the members of the State legislature of Nebraska, to meet at the capitol, in the City of Omaha, on Wednesday, the twentieth day of February, instant, at the hour of 2 o'clock P. M., for the purpose of taking action upon the conditions as proposed by Congress."

The legislature meet in accordance with the proclamation of the Governor and declared:

"Be it further enacted by the Legislature of the State of Nebraska, That the act of Congress of the United States, entitled 'An act for the admission of the State of Nebraska in the Union,' passed February 9, 1867, be, and the same is hereby rati-

fied, adopted, and accepted; and it is hereby declared That the provisions of the third Section of the said act of Congress shall be a part of the Organic Law of the State of Nebraska."

Then followed the names of the speaker of the house and of the president of the senate, also the words "Approved February 21, A. D. 1867. David Butler, Governor of Nebraska."

President Johnson, on the 1st of March, 1867, issued his proclamation, declaring the state had complied with the fundamental condition imposed by the third section of the act of February 9th, and that the admission of the state was complete.

We now return to our proposition: Counsel's entire argument, with respect to the application of the fifth and sixth amendments to the federal constitution to the State of Nebraska, is based upon that part of the fourth section of the enabling act of 1864 which reads as follows:

"That the members of the convention thus elected shall meet at the capitol of said territory on the first Monday in July next, and after organization shall declare upon behalf of the people of said territory that they adopt the constitution of the United States."

Of the declaration thus *required* counsel says:

(a) That it was made by the members of the convention.

(b) That it was a condition to the admission of the state into the Union, and, hence, was covered by the 2nd section of the admission act of February 1867, and

(c) That it is, therefore, binding, irrevocably, upon the people of the state, and has the effect, irrevocably, of making the constitution of the United

States a constitution of the State of Nebraska, binding upon it from the moment of its admission into the Union; limiting the state's power where it limits the powers of Congress, and granting to the state powers where it grants them to Congress.

I. *We deny that the declaration was made.*

This is proved conclusively by the extract which we have given from the opinion of the Supreme Court, wherein it is shown that the constitutional convention, after organizing, did nothing but adjourn. We can add nothing to this, and leave it as a settled fact, that the declaration was never made. It is clear, therefore, that, since plaintiff in error bases his entire argument, on this branch of the case, upon the theory that this declaration was made, and that thereby the restrictions of the fifth and sixth amendments to the federal constitution were made applicable to the state, his argument must fail.

II. *We deny that the act of February 9th admitting the state into the Union required the declaration under Discussion to be made, or treated it as made, by either the members of the constitutional convention or the people of the state. And we further deny that it was made a condition to the admission of the state.*

In the first place the declaration was never intended by the enabling act to be a condition precedent to the state's admission. Those things which were made conditions precedent are enumerated in the fifth section of the act. It is therein provided what must appear to the President before it shall become his duty to proclaim the state admitted to the Union. There were three things to be shown. First, The certificate

of the acting governor that the new constitution had received a majority of the legal votes cast. Second, A copy of that constitution, disclosing that it contained all the provisions required by the act. Third, A copy of the ordinance for the submission of the constitution to the people for their ratification or rejection. And when these things were shown to him, it was made his duty to declare the state admitted on an *equal* footing with the original states.

He was not required to ascertain whether or not the members of the convention had made the declaration in question. In fact, even if the President knew that it had not been made, it would still have been his duty, under the terms of the enabling act, to declare the state admitted. His duty to issue his proclamation to that effect was not to be affected, in any way, by the failure of the members of the convention to make the declaration.

Further, the enabling act provides in its first section that the inhabitants of the territory

> "be, and they are hereby, authorized to form for themselves a constitution and state government, with the name aforesaid, which state, *when so formed*, shall be admitted into the Union as hereinafter provided.

Therefore, the admission was to take place upon the formation of a constitution and state government by the inhabitants of the territory. That was all that the inhabitants were required to do to secure admission. The method of their admission was to be "as hereinafter provided" in the act.

Therefore, we say that this declaration was not made by the enabling act a condition, within the meaning of that word, as it is used in the act of February

9th admitting the state, and wherein it is provided that the state shall be "subject to the conditions" of the enabling act. It not being a condition of the enabling act, the state by the declaration of the act of February 9th, was not made subject to it.

2. To the possible suggestion that the admission of the state, is, in itself, conclusive proof, that all the requirements and conditions of the enabling act were complied with, we answer that such is not true, for the reason that the act of February 9th admitting the state declares upon what the state was admitted. It says in section 1:

> "Whereas, it appears, that the said people have adopted a constitution, which, upon due examination, is found to conform to the provisions, and comply with the conditions of said act [meaning the enabling act] and to be republican in its form of government, and that they now ask for admission into the Union: Therefore,
>
> Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled, That the constitution and State government which the people of Nebraska have formed for themselves, be, and the same is hereby, accepted, ratified, and confirmed, and that the said State of Nebraska shall be, and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States, in all respects whatsoever."

The admission was had then upon proof that the constitution complied with the conditions of the enabling act. There is nothing in the enabling act which requires the constitution to contain the declaration under consideration. And there could not be, therefore, in the nature of things, anything in it to show that that declaration had been made. And hence the

declaration, that the constitution complied with the conditions of the act, had reference to those provisions which were to be *embodied* in the constitution, and to nothing else.

3. It may be said that while it was not made a condition by the enabling act, to be performed by the *state*, it was a condition necessary to be performed by the *members* of the *convention* before they could legally proceed, under the terms of the enabling act, to form a constitution, and, hence, the declaration, in the act of February 9th, admitting the state subject to *all* the conditions of the enabling act, makes it subject to this condition. This cannot be so, because the state could not perform a condition, according to the terms of the enabling act, which was, by the terms of that act, to be performed by *somebody else*, to-wit: the members of the convention. And hence do we say, that the conditions referred to in the act of February 9th, are the conditions which the state was to perform, and which are the equivalent of the things which were to be shown by the terms of the enabling act to the President before it become his duty to declare the state admitted;—and the declaration under discussion, as we have seen, was not one of those things.

4. But we need not speculate about the meaning of the word "conditions" as it occurs in the act of February 9th. Just what it includes is made very clear by the author of the act himself, and by others who engaged in the debate upon the bill in the United States senate. Senator Wade is the author of the act and introduced it in the senate,

Congressional Globe, part 1, 2nd session, 39th Congress, page 13.

Speaking of what was included within the word "conditions" as used in his act he said:

"The only conditions we imposed upon these people by the enabling act were in these words which I read from that act:

"Said constitution shall provide by an article forever irrevocable without the consent of Congress of the United States:

1st, That slavery or involuntary servitude shall be forever prohibited in this state.

2nd, That perfect toleration of religious sentiment shall be secured. And no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship.

3d, That the people inhabiting said territory do agree and declare that they forever disclaim all right and titled to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States residing within the said State, shall never be taxed higher than the land belonging to the residents thereof; and that no taxes shall be imposed by said State on lands or property therein belonging to or which may hereafter be purchased by the United States."

These are the three conditions that have been for many years imposed upon new states. These conditions have been literally complied with in the constitution now submitted to us."

Congressional Globe, *supra*, page 127—8.

Mr. Sumner, who opposed the bill, understood the conditions imposed to be the same as those stated by Senator Wade.

Congressional Globe, *supra*, page 330.

And not one of the senators who participated in the debate disputed the statements of either Senator Wade or Senator Sumner, or even intimated that there were any other conditions laid by the enabling act.

III. *It was not within the power of Congress to impose any condition on the state without her consent.*

1. The declaration of the second section of the act of February 9th, that the new State of Nebraska was subject to all the conditions and restriction of the enabling act, was made after the declaration that the state had been admitted into the Union. In this first declaration Nebraska has never acquiesced. Nor was it the intention of Congress that she should. The Congress contented itself with the bare declaration, that the state was subject to the conditions of the enabling act. It did not ask the state's consent or acquiescence, and made no provision for obtaining either. It did, however, require the acceptance, by the Legislature of the state, of the conditions of the third section of the act, which conditions it declared to be fundamental, and directed that the territorial governor should convene the legislature together for that purpose. Let it be noted, please, that it was the legislature of the state which Congress directed to be called together. Thus recognizing that Nebraska was then a state. The governor convened the legislature for the purpose named, and for that purpose only. And he had, indeed, no power to convene it for any other purpose whatever. But, nevertheless, when it assembled it declared that it ratified, adopted and accepted the entire act of February 9th. This it clearly had no authority to do. It was convened to ratify the third section, and had no power to go further under the call.

But where or when did this state legislature get its authority to bind the people by its ratification of the conditions of the third section? It was elected

by the people not to make a constitution or organic law, or to consent to fundamental conditions, but to obey the constitution of the state, as that constitution had been adopted by the people at the polls. It had no more power to change the constitution, or consent to a change therein, and bind the people thereby, than would any voluntary organization of men which might have been selected in the state. Congress might as well have required the ratification of its fundamental conditions by the Young Mens Christian Association, if there was such a body in existence in Nebraska at that time. The ratification would have been just as effective to bind the people.

But however that may be, if the conditions of the second section, (we say of the second section, because we are not interested in those of the third,) are binding on the people of this state, they are so without the state's consent. Congress did not ask for it, and the legislature which assumed to give it, did not have the power to do so under the call concerning it.

The conditions are not binding, for it is a fundamental condition, made so by the Declaration of Independence, whose principles the enabling act required should *not* be disregarded in the constitution of the state, that "all governments derive their just powers from the consent of the governed."

On this point we present an extract from the opinion of Judge Mason of the Supreme Court of Nebraska in the case of *Brittle v. The People*, 2 *Nebraska*, 231. He said:

> "The people of the proposed state are to be 'the governed.' The government which is set over them should have their consent and approval, or it does not possess just authority; and the fundamental maxim is violated.

> Again: it is not within the constitutional power of Congress to frame a constitution for the people, and, *nolens volens*, force it on them. The Federal Constitution authorizes it to guarantee a government republican in form to every state. The expression of this one power over the State excludes the exercise of all other powers. It was competent to open the constitution with which Nebraska presented herself asking admission, and see whether it provided a government republican in form. If that constitution did not provide such a government, Congress could refuse admission, or enter into negotiations with the people of the proposed state to secure the necessary amendment. But it could not say to the applicant, 'This instrument requires your judges of the Supreme Court to hold the District Courts: I will change that, and then force you into the Union with the constitution so modified.' That would have been beyond the competency of Congress, because it would have been exacting more than the constitution authorized it to exact. Besides, the provision that 'new States may be admitted by the Congress into this Union' clearly indicates, by the frame of the clause, the authority to admit them upon their application, and not to force them in upon arbitrary terms prescribed by Congress."

Daniel Webster made some observations in his great speech in the Rhode Island case which are also pertinent here:

> "Now, without going into historical details at length, let me state what I understand the American principles to be on which this system arises.
>
> "First and chief: No man makes a question that the people are the source of all political power. * * * * * * * * Why, where else can we look but to the people for political power in a popular government?" (page 222.)

Again:

"Well then, let all admit, what none deny, that the only source of political power in this country is the people." (page 222.)

Again, on same page:

"The people cannot act daily as the people; they must establish a government and invest it with so much of the sovereign power as the case requires, and this sovereign power, being political, and placed in the hands of the government, that government becomes what is popularly called the *state*."

Again, on page 227:

"Another American principle growing out of this, and just as important and well settled as is the truth that the people are the source of power, is, that when in the course of events it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things, or of opinion, the legislative power provides for that ascertainment by an ordinary act of legislation. Has not that been our whole history?"

Again on page 229, and as a summing up of the whole argument which preceded on this point, he declares:

"We see, therefore, from the commencement of the government under which we live, down to this late act of the state of New York, one uniform current of law, of precedent, and of practice, all going to establish the point that changes in government are to be brought about by the will of the people assembled under such legislative provision as may be necessary to ascertain that will truly and authentically." (Works of Daniel Webster, Vol. 6, pages 221 to 229.)

The change then in Nebraska's new constitution could be brought about only by the will of the people, assembled under such legislative provisions as was necessary to ascertain that will, truly, and authentic-

ally, and not, as in the case at bar, through a territorial legislature not authorized by the people to speak for them with respect to such a change.

In view of the foregoing principles we say, that, if, by any construction of the act of February 9th, it could be said that the conditions and restrictions mentioned in the second section thereof were inclusive of the declaration required by the first sentence of the fourth section of the enabling act, the provisions of that section, that is, section 2, of the act of February 9th, not having been consented to by the people of the state, are not binding on the state.

IV. *Even if, by any process of reasoning, it could be said, that the declaration, required by the enabling act of the members of the constitutional convention, was made, or that by the admission of the state under the provisions of the act of February 9th, the state is subject to the effect of the declaration, the same as if it had been made, we deny that the effect is what plaintiff in error claims it to be.*

1. The meaning of the word adopt, most favorable to plaintiff in error, is "To choose for, or take to one's self; make one's own by selection or assent; to take or receive into a new relationship." (Century Dictionary.)

Taking a thing to one's self, or making a thing one's own by selection or assent, or receiving it into a new relationship, does NOT CHANGE its NATURE. It remains precisely the same as it was before the adoption took place. As, for instance: The adoption of a child, or an idea, or a speech, or a custom, does not change the nature of any of these things. It may change its accidentals, its surround-

ings, its relations, but not the thing itself. So by adopting the constitution of the United States, if the people of the state of Nebraska did adopt it, every word and syllable thereof as it existed before the adoption remains precisely the same after the adoption. The authority conferred on the members of the convention was to adopt the constitution, there was no authority to change it, even as to a word. If any change was wrought in it, it must have been done either before or at the time of the adoption, or afterwards. If before or at the time of the adoption, then the instrument adopted was not the constitution of the United States, but another instrument differing from the constitution of the United States to the extent of the changes which had been wrought therein. The members of the convention had no power to make such a change, they were limited to the adoption of the constitution just as it was, just as it had been from the beginning. True, as we have before observed, the relation which the constitution bore prior to the adoption had been changed by the adoption, but not the constitution itself. The adoption did not strike out of the constitution the words, "The Congress of the United States," where they appear, and substitute therefor the words, "the Legislature of the State of Nebraska." Therefore, the provisions thereof which, in terms, forbid the Congress of the United States to do certain things were not, by the adoption, changed so as to forbid the state legislature to do those things. They still continued to be limitations upon Congress. This is equally true of provisions which are not in terms, but in effect, limitations on Congress, as for instance, the fifth and sixth amendments under which plaintiff in error makes his most serious claim. These amendments, long before Ne-

braska's constitutional convention meet, had been adjudged by this court to be limitations not on the states but on Congress, and when they were adopted, they were adopted with that construction.

But even if it should be held that the construction just mentioned was not adopted with the constitution, the same result would follow. For, as we have seen, the adoption did not change a word or a letter of the constitution. It had after the adoption precisely the same words in it, no more, no less, that it had before the adoption. Therefore the meaning, after the adoption, must be the same. The 5th and 6th amendments must be construed in the light of all other provisions of the constitution. And so construing them, this court held that those two amendments were limitations on Congress, that they meant precisely the same as though they in terms limited the Congress, and the Congress only.

2. Nor will it do to say that only those provisions of the constitution which were applicable, or could be made applicable, to the state were adopted. The answer to such a suggestion is, that the enabling act required the adoption of the whole instrument, not a part. It may, indeed, be conceded that if only the fifth and sixth amendments were adopted they, standing by themselves, might support the construction contended for by the plaintiff in error. But more than they were adopted, the entire instrument was adopted, and those two amendments must be considered in connection with the whole instrument.

V. *Assuming that the declaration in question was made by the members of the convention, and that its effect is what plaintiff in error says it is, then we have two constitutions and two governments for the state of Nebraska.*

1. According to plaintiff in error's theory, the moment the members of the convention declared that they had adopted the constitution of the United States, if they did so declare, they formed a constitution for Nebraska and provided a complete scheme of government, legislative, executive and judicial. And, notwithstanding that Congress intended this, it, at the same time, and in the same act, aye, in the same section, as well as in Sec. 1, provided for the making of another constitution for the state, and another state government. This other constitution was not to be binding upon the people until ratified by direct vote thereof, as is provided by the fifth section. It was then the purpose of Congress when providing for the admission of Nebraska, if plaintiff's view is to be taken, that she should have two state constitutions and two state governments, one created for her by the mere declaration of the members of her constitutional convention, and the other by the direct vote of her people. One providing for an executive with certain powers, and the other providing for an executive with different powers from the first. One providing for a legislature with certain powers, and the other providing for another legislature with different powers and limitations. Such an absurdity, we respectfully submit, was never even thought of by Congress, much less intended by it. This objection is not answered by saying that the state constitution could not, in any event, contain anything in conflict with the constitution of the United

States. The conflict we are discussing is not one between the state and federal constitutions, but between one constitution formed by the people, and another created by the members of the convention out of the federal constitution.

2. Another argument to be drawn from the enabling act itself against the plaintiff's contention is, that the first section of the act, as we have had occasion to observe heretofore, authorizes the inhabitants of the territory to "form" for themselves a constitution and state government, which when so formed shall be admitted into the Union "as hereinafter provided." Thus the people were authorized to "form," not to adopt a constitution, and when that had been done the state was to be admitted; the Nebraska constitution was to be one formed; built; shaped; constructed out of the thought of the people, not adopted ready made. The last sentence of the fifth section as we have heretofore remarked, provided that the state should, when certain things were shown to the President, be admitted on an *equal footing* with the original states. And the act of February 9, actually admitting the state, declared that it was "admitted into the Union upon an *equal footing* with the original states in *all respects whatsoever*. How could this be so if its power was limited as contended by plaintiff in error? Such limitations, plaintiff says, were not placed on any other state. Then Nebraska, if plaintiff be right, was not admitted upon an *equal* footing with the original states in *all respects whatsoever*. And the declaration of Congress that it was is, according to plaintiff, wrong. No, the two things are utterly inconsistent, either Nebraska is not limited by the fifth and sixth amendments, or she was not admitted on an equal footing

with the original states. That she was so admitted, Congress has declared. Therefore the limitations of the fifth and sixth amendments do not apply to her.

VI. *Any conditions imposed by Congress upon the state at the time of her admission which, if enforced, would place her upon an unequal footing with the original states in any respect whatsoever are void.*

I. The effect of plaintiff's contention is, that the limitations of the fifth and sixth amendments rest upon the state, and that she can do nothing to escape them; that they are part of her organic law, and that she is without power to change them. It will be remembered in this connection that the first constitution of Nebraska, the one under which she was admitted, had a provision substantially the same as the fifth amendment to the constitution of the United States. But in 1875 the people changed their constitution and added a provision empowering the legislature to provide for holding persons to answer for criminal offenses on information of a public prosecutor, and authorizing it to abolish, limit, change, amend or otherwise regulate the grand jury system.

Plaintiff in error says the people had no power to make this change. Judge Cooley in his work on the Principles of Constitutional Law, p. 77, says on this point:

> "But when a state comes into the Union it is received on an equal footing with the original states, with all their rights and privileges. It must, therefore, have the same power to amend its constitution which is possessed by the other states. And the conditions which shall undertake to limit its power in this regard, must, in a legal sense, be wholly inoperative."

Dr. Von Holst, in his work on Constitutional Law, at page 188, says:

"The equality of the states is a fundamental principle of the constitution. Hence it has been argued that conditions which limited the right of self government, in comparison with the position in constitutional law of the other states, were inadmissable, and that they could not be enforced; because, as soon as the admission has taken place; the state had become complete master of its freedom of action. * * * * But as Congress never *must* admit a state, the imposition of conditions of any sort cannot be hindered, if they be not directly unconstitutional. And if a state promises not to make use of a certain right guaranteed it by the constitution, this is not unconstitutional; it is simply not obligatory from the standpoint of constitutional law. The imposition and adoption of such conditions are to be regarded as a political pact, to the maintenance of which the state is bound by truth and faith, but *not* by constitutional law."

Pollards's Lessee v. Hagen et al., 3 Howard, 212-213.
Starder v. Graham, 10 Howard, 82.
Weber v. Hober, Commissioner, 18 Wall., 57.

VII. *The Congress did not intend, by the declaration required of the members of the convention, to secure to the citizens of Nebraska any important right, when it desired to do that it adopted another method.*

1. Counsel will, we imagine, deny that it was the intention of Congress to have the inhabitants of Nebraska apply to themselves all the provisions of the federal constitution. He will say, no doubt, that only those which secure to the citizen such rights as are secured by the fifth and sixth amendments were to be applied. The answer to that is, that when Congress

desired to have such provisions applied to the people of Nebraska it took another method from the one imagined by plaintiff. In the very same section of the enabling act, and within a few lines of the provision which evoked this discussion, the Congress provided for the application of just such provisions, by requiring them to to be placed in the state constitution, irrevocably, without the consent of Congress; they are:

1. That the constitution shall be republican and not repugnant to the constitution of the United States or the principles of the declaration of independence.

2. That slavery or involuntary servitude shall be forever prohibited in the state.

3. That perfect toleration of religious sentiment shall be secured, etc.

4. That the lands belonging to the citizens of the United States residing without the state shall not be taxed higher than the land belonging to the residents thereof, etc.

If Congress intended to limit the state in any other respect, would it not have placed the limitations in the above act. That it did not do so is, under the rule *expressio unius est exclusio alterius*, conclusive that it did not intend to impose them. Even those provisions which must appear in the constitution, might be revoked by the state with the consent of Congress. But, if counsel's interpretation of the first sentence of the fourth section of the enabling act is correct, no provision was made for revocation or change of the limitation on the state imposed by the fifth and sixth amendments to the federal constitution. Strange it would be indeed that Congress would provide for the revocation of limitations so important and fundamental

as those required by it to be placed in the state constitution, and should not provide for the revocation of the other limitations which counsel say were imposed.

VIII. *What was meant by the provision of the enabling act requiring the members of the Constitutional Convention to adopt the constitution of the United States.*

1. When the enabling act was passed, April 19th, 1864, the nation was in the throes of a civil war. A large part of the people of our common country had denied the binding force of the constitution, and alleged that it was a mere compact between the states, to be broken at will. Hence, when the inhabitants of the territory of Nebraska sought admission to the Union as a state, it was important to know how they stood with respect to the federal constitution. And so the members of the convention were required to show their loyalty to that instrument by adopting it immediately after organizing. By requiring this of them, no more was required than what we have already indicated. They were required to adopt the constitution in the application which it then had, and according to the meaning which it then bore, and had borne from the time of its adoption by the nation. The action required was a pledge of fealty, irrevocable. At no time thereafter could the state say, truthfully, that it was not bound by the constitution of the United States, as certain southern states had said, and that it could withdraw from the Union when it pleased. This is the reason why the Congress did not provide for the revocation of the declaration adopting the constitution, it did not intend that it should be revocable.

In conclusion permit us to suggest that the whole matter, in our judgment, could be disposed of by say-

ing, that whatever the effect of such a declaration on the part of the members of the convention might have been, it was never made, and, hence, the effect does not exist. Neither is it covered by the second section of the act of February 9th, 1867, which declares Nebraska subject to the conditions of the enabling act, for the manifest reason that this was not a condition to be performed by the state, but by the members of the convention. It was on the members the obligation was imposed, and consequently the declaration making Nebraska subject to the conditions imposed on her by the enabling act, would not make her subject to the conditions imposed on the members of the convention.

If our argument be correct, and we think it is, plaintiff in error must serve out his well deserved sentence in the Nebraska penitentiary, and with him hundreds of others for whom the doors of the penitentiary would swing outward, if this case was reversed.

Respectfully submitted,

CONSTANTINE J. SMYTH,

Attorney General.

BOLLN *v.* NEBRASKA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 393. Argued December 4, 5, 1899. — Decided January 15, 1900.

A law of Nebraska permitting the prosecution of felonies by information is not in violation of the Constitution of the United States.

Whatever be the limitations upon the power of a territorial government, it becomes entitled, upon the admission of such Territory as a State, to all the rights of dominion and sovereignty belonging to the original States, and stands upon an equal footing with them in all respects.

An objection that a defendant was denied due process of law in being refused a jury trial upon a plea in abatement, cannot be raised here, when no violation of the Fourteenth Amendment was set up until after the cause had been decided by the Supreme Court of the State.

THIS is a writ of error to review a judgment of the Supreme Court of Nebraska, affirming a conviction of the plaintiff in error by the district court of Douglas County, for the crime of embezzlement.

The proceedings in the case, so far as they are disclosed by the record before us, which was agreed upon under subdivision nine of rule ten of this court, are as follows:

On April 2, 1896, an information was filed by the county attorney for the county of Douglas against the plaintiff in error, both as city treasurer of the city of Omaha and as treasurer of the board of education, for embezzling moneys belonging to the city as well as moneys belonging to the school district.

On April 4, a motion to quash was filed upon four grounds: (1) That there was no authority of law to file an information for a felony; (2 and 3) because the prosecution was in contravention of the constitution of the State; and (4) because it was in contravention of article fourteen of the Constitution of the United States, and was without due process of law.

On the same day a paper was filed, entitled a plea in abatement, which prayed judgment that the information might be quashed for the same reasons, and in precisely the words of the motion to quash.

Statement of the Case.

On the same day, a demurrer was filed to the "*eighteen* paragraphs" of the plea in abatement, upon the ground that these paragraphs did not state facts sufficient to constitute a defence, or to raise an issue upon the plea.

Upon the same day, an order was entered overruling the motion to quash, to which the defendant excepted.

On April 6, another order was entered sustaining the demurrer as to the eighteen "reasons therein set forth," except the ninth; and "the court doth overrule the said demurrer as to the ninth reason therein set forth, with leave to the State to reply instanter." The State duly excepted to the ruling as to the ninth reason.

On the same day, a "reply to the ninth paragraph of the defendant's plea in abatement" was filed by the State, admitting that the defendant had had "no preliminary examination for said crime referred to in said ninth paragraph," but alleging that he waived such preliminary examination and his right thereto, as shown by the records of the court.

On April 8, 1896, a demurrer was filed to the information, and upon the same day both parties appeared in court, and announced their readiness to proceed to trial upon the ninth paragraph in defendant's plea in abatement. Thereupon the defendant demanded a trial by jury, and the court, on consideration, overruled the demand, to which ruling the defendant duly excepted. After introduction of evidence, pro and con, and upon due consideration, the court found that the defendant had waived a preliminary examination, and therefore found against him, and overruled the ninth paragraph of the plea in abatement. By the same order the demurrer was also overruled. The defendant being arraigned, refused to plead, whereupon the court entered a plea of not guilty, and the trial proceeded, and resulted in a verdict finding the defendant guilty upon the fourth count of embezzling $2500; upon the ninth count of embezzling $3000, and upon the eleventh count of embezzling $100,000.

Motion for a new trial being overruled, defendant was sentenced to fine and imprisonment upon the fourth, ninth and eleventh counts.

The case was carried to the Supreme Court of Nebraska and the judgment affirmed. The court delivered an opinion, in which it stated that "a plea in abatement was filed, to which the county attorney interposed a demurrer, which was overruled as to the ninth ground of the plea, and sustained as to the other seventeen grounds therein set forth." The petition in error, it was stated, contained 279 assignments, the only ones of which could be said to involve a Federal question being, first, that the State had no authority to prosecute by information, and, second, the refusal of the court to call a jury to pass upon the issue tendered by the ninth paragraph of the plea in abatement, that the defendant waived a preliminary examination before the magistrate. This opinion was filed May 18, 1897. 51 Nebraska, 581.

On September 20, 1897, plaintiff in error filed in the Supreme Court of the State assignments of error which appear to have been intended for this court, and on September 18, 1899, served upon the attorney general a petition to this court for the allowance of a writ of error upon the ground, first, that the plaintiff was convicted upon an information, and, second, because he had been denied a jury trial upon the issue tendered by special plea, that he had had no preliminary examination and had not waived the same.

Mr. Joel W. West for plaintiff in error.

Mr. Constantine J. Smyth for defendant in error.

Mr. Justice Brown, after making the above statement, delivered the opinion of the court.

Two questions were raised in the briefs and argument of the plaintiff in error: First, that a proceeding by information for a felony was not, so far as the State of Nebraska is concerned, due process of law, under the Fourteenth Amendment to the Constitution of the United States. Second, that the trial by the court, without a jury, of the issue raised by the ninth plea in abatement, whether the defendant had waived a preliminary examination, was not due process of law.

1. The first question, so far as it applies to States in general, was settled adversely to the insistence of the plaintiff in error in *Hurtado* v. *California*, 110 U. S. 516, in which it was held that a prosecution for murder did not necessarily require an indictment by a grand jury, where the constitution of the State authorized prosecutions for felonies by information. Subsequent cases have done nothing to weaken or qualify the force of this decision. Its principle was applied in *In re Kemmler*, 136 U. S. 436, to a law of New York providing for the punishment of death by electricity; in *Dent* v. *West Virginia*, 129 U. S. 114, to a statute subjecting physicians to punishment who practised medicine without a certificate as to their competency; in *Caldwell* v. *Texas*, 137 U. S. 692, to a statutory indictment for murder under the laws of Texas; and in *Hallinger* v. *Davis*, 146 U. S. 314, to a state statute conferring upon one charged with crime the right to waive a trial by jury, and to elect to be tried by the court. It was also cited with approval in *Baldwin* v. *Kansas*, 129 U. S. 52; *Leeper* v. *Texas*, 139 U. S. 462; *McNulty* v. *California*, 149 U. S. 645; *Holden* v. *Harvey*, 169 U. S. 383, and in *Hagar* v. *Reclamation District*, 111 U. S. 701.

It is insisted, however, that under the act of Congress of April 19, 1864, 13 Stat. 47, enabling the people of Nebraska to form a constitution and state government for admission into the Union, the power given to that State is restricted in that particular. After authorizing the inhabitants to form for themselves a constitution and state government, and providing for a constitutional convention, the fourth section of the act required "that the members of the convention . . . shall declare, on behalf of the people of said Territory, *that they adopt the Constitution of the United States;* whereupon the state convention shall be, and it is hereby, authorized to form a constitution and state government." We are informed, however, as a matter of history, in *Brittle* v. *The People*, 2 Nebraska, 198, that, the people of the Territory being at that time opposed to becoming a State, the convention adjourned *sine die* without taking action beyond its own organization.

Subsequently, however, the territorial legislature, without

calling a convention, framed a constitution which was submitted to and adopted by the people at an election held June 21, 1866. This constitution contained the following provision (schedule, sec. 6): "This constitution is formed, and the State of Nebraska asks to be admitted into the Union on an equal footing with the original States, on the condition and faith of the terms and proposition stated and specified in an act of Congress, approved April nineteenth, 1864, authorizing the people of the Territory to form a constitution and state government; the people of the State of Nebraska hereby accepting the conditions in said act specified."

At its following session and on February 9, 1867, 14 Stat. 391, c. 36, Congress passed another act admitting the State of Nebraska into the Union "upon an equal footing with the original States, in all respects whatsoever," though the second section of this act declared "that the State of Nebraska shall be, and is hereby, declared to be entitled to all the rights, privileges, grants and immunities, and to be subject to all the conditions and restrictions of an act entitled 'An act to enable the people of Nebraska to form a constitution and state government, and for the admission of such State into the Union on an equal footing with the original States.'"

The argument of the plaintiff in error in this connection is that, by these acts, the people of Nebraska *adopted the Constitution of the United States*, and thereby the first eight amendments containing the bill of rights became incorporated in the constitution of the State, and that the right to proceed for felonies, other than by an indictment of a grand jury, (as required by the Fifth Amendment,) was taken away from such State.

But conceding all that can be claimed in this connection, and that the State of Nebraska did enter the Union under the condition of the enabling act, and that it adopted the Constitution of the United States as its fundamental law, all that was meant by these words was that the State acknowledged, as every other State has done, the supremacy of the Federal Constitution. The first section of the act of 1867, admitting the State into the Union, declared: "that it is hereby admitted

into the Union upon an equal footing with the original States in all respects whatsoever." It is impossible to suppose that, by such indefinite language as was used in the enabling act, Congress intended to differentiate Nebraska from her sister States, even if it had the power to do so, and attempt to impose more onerous conditions upon her than upon them, or that in cases arising in Nebraska a different construction should be given to her constitution from that given to the constitutions of other States. But this court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such Territory has become a State of the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original States, and, in the language of the act of 1867 admitting the State of Nebraska, it stands "upon an equal footing with the original States in all respects whatsoever." *Escanaba Company* v. *Chicago*, 107 U. S. 678; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *Ward* v. *Racehorse*, 163 U. S. 504. Indeed, the legislation of Congress connected with the admission of Nebraska into the Union, so far as it bore upon the question of citizenship, was fully considered by this court in the case of *Boyd* v. *Thayer*, 143 U. S. 135, and the conclusion reached that upon its admission into the Union the citizens of what had been the Territory became the citizens of the United States and of the State.

This court has also repeatedly held that the first eight amendments to the constitution applied only to the Federal courts, and it certainly could never have been intended that these amendments should be imposed upon Nebraska, and thereby a hard and fast rule made for that State that would forever preclude amendments inconsistent with the bill of rights of the Federal Constitution, and which this court has held to be applicable only to Federal courts. As we have repeatedly held, the Fourteenth Amendment was not intended to curtail the powers of the States to so amend their laws as to make them conform to the wishes of their citizens, to

changed views of administration, or to the exigencies of their social life. It may be readily supposed that the inhabitants of each State understand perfectly their own local needs and interests, and, with the facilities with which the constitutions of the several States may be amended, it is scarcely possible that any evil which might be occasioned by an improvident amendment would not be readily redressed. Not only did Congress in the act of 1867 declare that Nebraska was admitted upon an equal footing with the original States, but the whole Federal system is based upon the fundamental principle of the equality of the States under the Constitution. The idea that one State is debarred, while the others are granted, the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution, that it cannot be entertained even if Congress had power to make such discrimination. We are, therefore, of opinion that the provision of the constitution of Nebraska, permitting prosecutions for felony by information, does not conflict with the Fourteenth Amendment to the Constitution of the United States.

2. We do not find it necessary to consider the question, whether the court denied to the defendant due process of law, in refusing a jury trial upon the question whether he had waived a preliminary examination before the magistrate. The statute of Nebraska, providing for the prosecution of offences by information, requires that "no information shall be filed against any person for any offence until such person shall have had a preliminary examination therefor, . . . unless such person shall waive his right to such examination." A plea in abatement is said to have been filed upon that ground; but the only plea in abatement which appears in the transcript of the record before us sets forth but four grounds: First, that there was no authority of law for the filing of an information charging the defendant with a felony; second, because the defendant, under the state constitution, was granted immunity from answering to a criminal charge, except upon presentment or indictment by a grand jury; third, because this prosecution is in contravention of the state constitution,

guaranteeing that no person shall be deprived of life or liberty without due process of law; fourth, because this prosecution is in contravention of the Fourteenth Amendment of the Constitution of the United States. It is true that, in the demurrer to this plea, and in the order sustaining such demurrer, it would appear that there were eighteen grounds for the plea in abatement; and that as to the ninth ground, the demurrer was overruled, with leave to the State to reply instanter. From the reply to the plea in abatement it would appear that the ninth paragraph of the plea set up the fact that the defendant did not have a preliminary examination as required by law, the reply alleging that he waived it; but nowhere in the plea in abatement does it appear what this ninth paragraph was, although the judgment of the court was "that the defendant waived a preliminary examination before the examining magistrate, and therefore finds against the defendant, and overrules the said ninth paragraph of the said plea in abatement." As the opinion of the Supreme Court also discusses the ruling of the court below denying to the defendant a jury trial upon this ninth paragraph, we may, perhaps, be at liberty to take notice of it; although in subdivision nine of rule ten, under which this record was printed, it is said that the court will consider nothing but those parts of the record designated by the parties, and the errors so stated.

But, without expressing a decided opinion upon this point, we are confronted by another difficulty in the fact that it is nowhere alleged in the record that a denial to the defendant of a jury trial of this issue was violative of the Constitution of the United States. It is true that in the fourth paragraph of the plea in abatement it is said that "this prosecution is in the contravention" of the Fourteenth Amendment, but this evidently refers to the prior paragraphs, which deal only with a prosecution by indictment. In the opinion of the court discussing this question, no allusion is made to the denial of this jury trial being in conflict with the Fourteenth Amendment, and it is only in the assignments of error, filed in the Supreme Court of the State four months after its judgment of affirmance, that the defendant sets it up as the denial

of a Federal right. Indeed, it nowhere appears in the record or in the opinion of the Supreme Court that the denial of a jury trial of this issue was claimed to be in contravention even of the state constitution. The question is discussed by the court as one of general law, and it is only the prosecution by information that the court discusses as a constitutional question.

On November 10, 1899, the Chief Justice of the Supreme Court of Nebraska certifies that the only reference made by the plaintiff in error to the Constitution of the United States is set forth in certain language quoted from his brief. From this brief it would appear that the denial of the right of trial by jury upon the question of waiver of preliminary examination was set up as a violation of the constitutional provision of Nebraska, that "the right of a trial by jury shall remain inviolate;" but it nowhere appears that it was claimed to be in violation of any other provision of the Constitution, or of the Fourteenth Amendment to the Constitution of the United State.

Upon this state of the record we are unable to say that the decision of the court below was against a title, right, privilege or immunity, specially set up or claimed by either party, under the Constitution of the United States.

We have repeatedly decided that an appeal to the jurisdiction of this court must not be a mere afterthought, and that if any right, privilege or immunity is asserted under the Constitution or laws of the United States it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained. It is true that this court has sometimes held that, if a Federal question appear in the record and was decided, or such decision was necessarily involved in the case, and that such case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review here; but such cases have usually, if not always, arisen under the first or second clauses of section 709, and have involved the validity of a treaty, statute or authority exercised under the United States, or the validity of a statute or authority exercised under a State,

where such statute or authority is alleged to be repugnant to the Constitution or the laws of the United States. *Columbia Water Power Co.* v. *Columbia Street Railway &c. Co.*, 172 U. S. 475. In the case under consideration the right to a trial by jury is claimed under the Constitution of the United States; but as it was never set up or claimed prior to the decision of the Supreme Court of the State, it is too late to raise the question here.

The fact that the defendant did set up in his plea in abatement his immunity from prosecution upon an information of the county attorney, clearly appears, but we are not at liberty to consider other constitutional questions which might have been involved, if they had been properly set up and claimed. The observations of this court in *Dewey* v. *Des Moines*, 173 U. S. 193, are conclusive against our consideration of this question.

The judgment of the Supreme Court of the State of Nebraska is therefore

Affirmed.

Mr. Justice Harlan dissented.